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In the Supreme Court of the United States

OCTOBER TERM, 1970

SALVATORE BATTAGLIA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Salvatore Battaglia, prays that a Writ of Certiorari be issued to review the decisions of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENTS AND OPINIONS OF THE COURT BELOW

The opinion and the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause sustaining the conviction of the Petitioner, dated January 9, 1968, was the subject of a Petition for Writ of Certiorari upon which this Court entered an order granting certiorari, vacating the judgment of the United States Court of Appeals for the purpose of a remand of the case to the United States District Court for further proceedings in conformity with the opinion of this Court in *Alderman v. United States*, 384 U.S. 165. On October 2, 1970, the Seventh Circuit Court of Appeals delivered its opinion and entered its judgment affirming the District Court's re-sentencing of the Petitioner, and the present Petition for Writ of Certiorari is sought to review the re-sentencing of the Petitioner and a review of his original trial in the District Court, as well as the rehearing on remand by this Court. The opinion of the United States Court of Appeals for the Seventh Circuit originally affirming the sentence to 15 years is reported at 394 F.2d 304.

The second opinion of the United States Court of Appeals for the Seventh Circuit affirming the re-sentence of the Petitioner to 15 years' imprisonment and $10,000 fine, is not yet reported. Both opinions and the judgment orders thereon are reproduced in the Appendix hereto.

To each opinion by the Court of Appeals there is the dissent of now Chief Judge Swygert. His original dissenting opinion appears at Appendix 25-45. His dissent to the second opinion of the Seventh Circuit Court of Appeals dated October 2, 1970 contains a statement of adherence to his dissents in the prior appeals and a statement that he would reverse the convictions for the reasons stated therein, App. 78.

The Petitioner was denied bail after verdict and pending appeal by the District Judge and has been continuously incarcerated since the return of verdict, May 9, 1967.

JURISDICTION

The last judgment of the Court of Appeals below was entered October 2, 1970. An extension of time within which to file a Petition for Writ of Certiorari was sought and granted by Mr. Justice Marshall extending the time for filing the Petition to and including December 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. (A) May a conviction be sustained under the conspiracy provisions of the Hobbs Act without a showing that a defendant specifically knew and intended the making of threats of violence by a co-defendant, and an unrelated person, where the threats were not proved to be connected to the defendant or to be within his knowledge?

(B) Is not specific intent to violate a federal law necessary for violation of the conspiracy section of the Hobbs Act?

(C) Should the doctrine of "criminal venture of indefinite outline" and the theory that a conspirator must "take his chances" as to the methods used by his co-conspirators, be expanded, contrary to the decisions in which they were first expressed so as to bring a party to a plan to secure money from a building project, even by fraud, liable for the vicious threats of violence made by a co-conspirator and an outsider to the plan?

2. Whether, under *Dennis* v. *United States*, 384 U.S. 855 (1966), to obtain the grand jury testimony of a key government witness at trial, a conspiracy defendant must do more than request the prior testimony for cross-examina-

tion purposes? When a document first given effect to Rule 16 may it also apply retroactively to trials held after Rule 16 became operative as a document rule prospectively?

3. Whether under *Smith v. Illinois*, 390 U.S. 129 (1968), defense counsel may be denied the opportunity to ask a key government witness where he lives now?

4. (A) May a trial court instruct the jury, in a conspiracy case, during the government's presentation of evidence, that evidence theretofore received as to certain defendants was now admissible against all defendants, and that such evidence should be considered as pertaining to all defendants, where no reference is made to the evidentiary rules for consideration of evidence in conspiracy cases, and where the final charge of the Court to the jury makes no reference to the incomplete instruction, given over specific objection, and does not direct the jury to the fact that it is now getting an overruling and more complete instruction as to how it may consider evidence against the respective defendants?

(B) Should a mere ruling on evidence admissibility be dignified to the form of an instruction on how to consider evidence, and must Rule 30 of the Federal Rules of Criminal Procedure be complied with by the trial judge, in any event?

5. May an indictment for conspiracy under the Hobbs Act be amended by evidence of various threats made by one co-conspirator and a person not charged, two years prior to the commencement date of the conspiracy charged in the indictment, and made in furtherance of objects not charged in the indictment, or known to the defendant?

6. Could the damage and prejudice engendered by the pre-indictment period various threats, of personal harm, have been protected against or limited, by any instruction,

event it was had been given, and was not such evidence cause for severance of the jury from the issues made by the indictment and the plea of not guilty?

2. Was the Petitioner denied sufficient protection from the exposure of a flood of pre-judicial publicity, both pre-trial and during trial, where the trial court denied a motion to require prospective and effectual, of jurors concerning publicity, and failed to afford the protections suggested by the Supreme Court in the conduct of the trial below, and where the coercive nature of the questions propounded to the jury collectively, was calculated to frighten the persons from full and honest answers?

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *"

Section 1951, Title 18, United States Code, provides:

> "*Interference with commerce by threats of violence*
>
> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.
>
> "(b) As used in this section
>
> (1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means

of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Rule 30, Federal Rules of Criminal Procedure, provides:

"Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

STATEMENT OF THE FACTS

(a) Evidence of The Three Government Witnesses Relating to the Alleged Conspiracy.

William Riley was President of the Riley Management Corporation. (A. 489).* His company was building the King Arthur project, a group of apartment buildings, in Lansing, Illinois. Petitioner Dave Evans was his superintendent of construction on that job (A. 501).

In June, 1964, Riley had a conversation with Evans in which he told Evans that the Lansing job was to begin and that Evans was to let the sewer contract. Riley told Evans that he did not want the people from Melrose Park, especially Amabile and Palermo, to know of this Lansing project (A. 502-3). A few days later, Palermo contacted Riley about the work on the Lansing project (A. 503).

In late July or early August, 1964, Amabile, DiVito and Pranno met. DiVito had been in the sewer contracting business for a number of years. Amabile told DiVito and Pranno that they could get the sewer and water mains contract of the Lansing project if they could come up with a "good clean fellow" to head the job (A. 124).

In mid-September, Pranno and DiVito spoke with LaKey and convinced him to take charge of the company that would have the sewer contract for the Lansing project (A. 126-7).

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* "A." references are to the original three-volume joint appendix filed in the Court of Appeals on the first appeal in case Nos. 16312, 16313, 16314. "App." references are to the appendix to this Petition.

Later during the month of September, Pranno, DiVito and Evans met at Amabile's apartment and Pranno informed Amabile that they had a "good clean fellow", LaKey. Amabile then said he would give them the job but that he wanted $20,000 "off the top" from them. Pranno agreed to give Amabile the money (A. 128-9, 256).

Government witnesses Mike DiVito, Henry LaKey and an unindicted alleged co-conspirator, Rocco Pranno, formed the Carlson Construction Company in October, 1964, for the purpose of bidding on and getting the sewer construction job (A. 130-132).

Pranno loaned Carlson Construction Company approximately $13,000 for its initial bank deposit in order to start business (A. 273). Some $12,000 of that initial money was deposited by LaKey to the account of Carlson Construction Company in October, 1964 (A. 273). Pranno, DiVito and LaKey borrowed an additional $5,000 in cash for the Carlson Construction Company account (A. 146).

The Carlson Construction Company commenced operations. It put in the pipes, water lines and water pumping lifts (A. 287-8).

Because of urgencies, shipments were made to the project in Lansing, Illinois, quite rapidly from the Granco Steel Company, St. Louis, Missouri. "These shipments had been expedited rather than delayed." They were sent earlier to Lansing from Missouri than was normally done (A. 108).

DiVito and Pranno informed Amabile that they would need more money on the job if Amabile was to get his $20,000. Amabile instructed Evans to "jack up" the price of the contract. Evans did so by preparing another bid

some $40,000 to $45,000 higher (A. 310). There was no need to "juck up" the prices of the construction if extortion was to be the means to obtain money.

In November, 1964, Amabile instructed LaKey to make the first draw from the Riley Company. LaKey drew up the papers calling for a draw of $55,000 (A. 537). However, Evans reworked the figures and arrived at the amount of $47,517.97 (A. 302).

On November 12, 1964, LaKey obtained the first draw from the Riley Company for its work in the amount of $47,517.97 (A. 303). LaKey deposited $39,000 in the Carlson bank account, keeping $8,517 (A. 304). He said he gave Pranno $8,000 in cash, retaining $517 himself for two weeks of his salary (A. 305).

At Amabile's request, LaKey withdrew $20,000 in cash and gave it to Amabile on November 13, 1964 (A. 306-7).

LaKey and Amabile visited Evans, who was a patient in a hospital, and Amabile gave Evans a "wad of money" (A. 301).

Numerous conversations took place where Amabile instructed DiVito, LaKey, Pranno and Evans that Riley was not to learn of Pranno and Amabile's connection with the Carlson Construction Company. Amabile also told these men that Riley was not to know that Evans was in any way connected with the Carlson Construction Company (A. 140, 143, 281, 286, 347).

After the first draw had been made, LaKey complained to Evans that he was unable to pay his bills, and Evans allegedly told LaKey not to worry and stated: "I'll talk to Joe Shine and Joe Shine will talk to the man. We will see that the money in the bank for you." (A. 342). This

conversation again emphasized that Evans was intent on securing money for the Carbon Construction Company so that the work would continue and the bills could be paid.

Lakey made a request for a second draw of $[illegible] in early January, 1983. (A [illegible]) Riley's controller, one Hal Meitner, refused to authorize a payment. Riley told Lakey that he would not authorize the payment because he learned that the suppliers on the job were not being paid. (A [illegible])

Lakey then told Amabile in Evans' presence that the second payment draw was turned down by the Riley people. (A [illegible]) Amabile told Evans that he wanted Evans to go with Lakey to the Riley office the following morning. (A [illegible]) The next morning, Evans suggested to Lakey that they should enter the Riley offices separately. (A [illegible]) Evans and Lakey spoke with Riley concerning the second draw and Evans said that complications had developed on the job. (A [illegible]) Riley again turned down Lakey. (A [illegible])

Lakey again returned to Amabile and informed him that Evans and he had been turned down by Riley. (A [illegible]) At this meeting, Evans was not present. Amabile then told Lakey: "Now be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." (A [illegible])

The next day, Amabile and Lakey went to the offices of the Riley Company in Bellwood, Illinois and talked to Riley. Riley told Amabile that they couldn't pay because to do so would jeopardize his position with the lending institution. According to Riley, Amabile told Riley that he had to pay Lakey, that Lakey was a friend of theirs, and that, if he didn't pay, "all sorts of people would get mad." (A [illegible]) Amabile said that Riley had no choice in the matter, that he had to pay Lakey, that "the man" wanted his money. Evans was not present at this meeting. (A [illegible])

Subsequently, Riley authorized the payment by Lower Bay Corp. and Lower Associations to Arabian Construction Company in the approximate amount of $[illegible], the payment allegedly in the indictment to have been extorted from him.

Riley testified that he authorized this payment because he was afraid of Arnobile. Upon objections, he testified he was afraid because, "in previous meetings I had been threatened repeatedly. I had been at numerous, numerous meetings, where I was threatened with physical harm, harm to my family, callings of the conspiracy, execution, employee threatened." (A [illegible])

Upon objections, Riley stated that Arnobile and Nick D'Ambrosio had referred to or the indictment anywhere, threatened him (A [illegible])

Riley testified that as late as September, 1981, he thought Evans was a very fine man (A [illegible])

From the second draw which LaKey received, he said he withdrew $17,000 for Arnobile (from which LaKey got $5,000) (A [illegible])

LaKey had gone to Florida after the payment of the second draw and was called there by Evans. Evans told him that there had been trouble on the job and that Arnobile wanted to see him (A [illegible]).

LaKey returned from Florida and in the presence of Evans, Arnobile told LaKey, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble." (A [illegible]). Since LaKey was present at the time of Arnobile's threat, this conversation

to an indictment that even at this late date Kiley was not aware of the threat and that Amabile was deliberately keeping knowledge of the threat from him

(b) Evidence of Palermo Amabile Threats Not Anywhere Alleged in the Indictment

Kiley testified that on April 1981, he was in the office of Nick Palermo's Modern Pipe Plumbing Company. Palermo asked him about a proposed building project in Northlake, Illinois, and Amabile told Kiley that he, Amabile, was the man in Northlake and that Kiley was not going to build in Northlake without his permission. Amabile told Kiley it would cost him $[illegible]. A number of subsequent meetings were held with Palermo and Amabile in 1981 and at one of these Amabile asked Kiley if he had the $[illegible]. Kiley said he did not. Palermo said that he had the ability to stop the project of Kiley's then being constructed in Addison, Illinois. Kiley said he could not pay $[illegible]. Amabile said to give him $[illegible] in cash and $[illegible] in checks. Subsequently, Kiley paid Amabile $[illegible] in cash. [illegible]

Kiley testified that in September, 1981, Palermo and Amabile talked to him about the plumbing work for a project in Westmont, Illinois. Amabile told Kiley he must give the plumbing work to Palermo. Kiley objected to the quality of Palermo's work. Amabile told Kiley that he was nothing but a wise guy and he would handle [him] with a baseball bat if he didn't stop trying to be a wise guy. [illegible] Kiley asked to leave. Amabile told him he could not do so. They said that Kiley's construction superintendent, one Hubley, was the cause of all the problems. Palermo said that he would bury Hubley, and Amabile added that he would hammer the nails in Hubley's

[illegible] (A [illegible]) Then Arambula told Riley that he knew where Riley's mother lived, where his children went to school, and that he would need a couple more favors then we [illegible] if they did not get the plumbing contracts (A [illegible])

(c) Evans Buttaglia

Evans did not know, nor had he ever met Buttaglia during the period of the alleged conspiracy. Evans first met Buttaglia in 1967 on the day that case was first called to court (A [illegible])

(d) The Defense

The defendant, Evans,* testified in his own behalf. Although he was precluded from denying many of the important alleged conversations and meetings and from introducing affirmative evidence of his innocence, Evans did make a general denial that he was not involved in the crimes charged in the indictment (A [illegible]). Evans also testified that he never received any money from Arambula as alleged by the Government witnesses (A [illegible]).

Evans testified that he was 52 years old and that he had been gainfully employed in the construction business since he had been 18 years old. He had served in the United States Army and had received an honorable discharge. He had never been arrested (A [illegible]).

Evans also attempted to introduce evidence of his good reputation in the business community through four (4) witnesses who had known him for a long period of time. This evidence was declined by the trial judge (A [illegible]).

During the trial, at the conclusion of the evidence of William Riley, the government tendered an instruction to

* Petitioner in cause No. 92, October term, 1970.

the Court and requested that it be given at that point. The written form of this instruction, as it was to be given, was not furnished to the defense. After a colloquy, (A. 736-741), the following occurred:

> "Mr. Walsh: Has your Honor ruled on the instruction suggested by the prosecution?
>
> "The Court: I am going to give what I perceive to be a proper instruction.
>
> You know, under the rules with respect to instructions, I am sure you do, instructions are merely for the guidance of the Court, or for assistance.
>
> I am going to give an instruction which will in substance, be what the government requests."

The Court then instructed the jury that it was to consider as pertaining to all defendants, all evidence which had theretofore been admitted only as to one or more of the defendants, regardless of whether they were present when the acts or conversations or incidents testified about were done or carried on. Objection was made, (A. 742), that the Court inquired in the presence of the jury as to whether the defendants had any objection to such instruction. Thereafter, the Court did hear specific objections as to the instruction out of the presence of the jury (A. 743, 744).

No reference or limitation of this reference to mid trial instruction was made in the Court's final charge to the jury, (A. 956-977), although the Court did instruct on the subject of conspiracy (A. 966-973).

Although the majority opinion by the Court of Appeals contends that the Court carefully instructed the jury that the testimony concerning the threats by Amabile and Palermo in 1962 and 1963 were limited to show the reasonableness of Riley's fears, there is no such instruction in the

Court's charge. The Court of Appeals' reference to Tr. 2564 appears at A. 973. This instruction had reference to the state of mind of Riley testimony at A. 560-566 and did not refer to anything more than Riley's answer at A. 566.

> "No, the only reason I authorized the payment, I was afraid of Joe Shine."

Chief Judge Swygert, in his dissent, App. 42, says:

> "Moreover, I am at a loss to find the 'careful instruction' referred to by the majority."

The Petitioner Battaglia relies also upon the careful analysis and statement of the evidence contained in the dissenting opinion of Chief Judge Swygert reproduced in the Appendix to this Petition at App. 25, *et seq.*

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the Writ of Certiorari ought in this case [illegible] to be granted because there are [illegible] conflict between opinion and decision of the Supreme Court and the decision and opinion of the Seventh Circuit Court of Appeal entered in the case on January 2 1962 Appendix and on October 1 1962 after a motion for rehearing became Appendix

Further there are conflicts between the decision and opinion of the Seventh Circuit Court of Appeals now being sued and the opinion and decision of other Circuit Courts of Appeal concerning matters which the Court should settle

There are also errors of the District Court in a conspiracy trial and in the decision and opinion of the Court of Appeals below which require review by this Court and [illegible] of the power of supervision over criminal proceedings of the federal courts and the clarification of apparent [illegible] questions of law

1 Conspiracy

The government's theory of conspiracy law extends beyond [illegible] the concept of conspiracy prosecutions in [illegible] and the scope of the federal conspiracy statute [illegible] U.S. 18 U.S.C. Sec. 371)

The Court of Appeals below has sustained the government's [illegible] fundamental proposition of conspiracy law

[illegible] agreement to embark on some [illegible] is made responsible for [illegible] associates may commit, admittedly

without his knowledge or specific intent, even if they were beyond his understanding and would have drastically restricted the plans to which he did agree. He must "take his chances" as to any methods used by other conspirators.

This is considered to be a true analysis of the Court of Appeals' opinion (App. 10, 11).

A sharp conflict between the majority opinion and the dissenting opinion of Chief Judge Swygert on this point exists (App. 10, 11) contrasted to Chief Judge Swygert's dissenting comment upon the same matter, App. 38 through App. 40).

Chief Judge Swygert has included in his opinion the full comment of the Second Circuit in *United States v. Andolschek*, 142 F.2d 503 (2d Cir.) 1944 and *United States v. Falcone*, 109 F.2d 579 (2d Cir.), Aff'd 311 U.S. 205 (1940).

It is submitted that the sentence from the *Andolschek* decision included in Chief Judge Swygert's dissent shows the true sense and intent of the quotation made by Judge Cummings speaking for the majority of the panel of the Seventh Circuit Court of Appeals in this case.

The "indefinite outline" theory of vicarious guilt should plainly be regarded as one of the "attempts to broaden the already pervasive and wide sweeping nets of conspiracy prosecutions" that this Court has promised to "view with disfavour", *Grunewald v. United States*, 353 U.S. 391 at 404 (Harlan, J.).

In this case, the conspiracy proof as accepted by the Court of Appeals majority was established so far as Battaglia, the Petitioner, was concerned, principally by hear-

say evidence given by government witnesses, DiVito, La Key and Riley, who were thought by the Court of Appeals to be accomplices in extortion from Riley's construction company. At least, this appears as far as DiVito and La Key are concerned (App. 16). In fact, the only evidence in any way tending to connect Battaglia to any plan prosecuted was given by DiVito and LaKey, pronounced by the Court of Appeals to have been accomplices under the evidence. The doctrine announced by this Court in *Glasser v. United States*, 315 U.S. 60, 74-75 (1942), "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence", 315 U.S. at 75, applies to the traditional requirement that the existence of the conspiracy and the defendant's connection with it must be proved by the evidence from an independent source before hearsay statements and acts of alleged co-conspirators may be admitted against him. Chief Judge Swygert's review of the evidence shows that this requirement was repeatedly violated in the trial.

In the case at bar, Riley testified that he did not know Battaglia, although he had seen him once in Annabile's tavern. The testimony referred to was Riley's description of repeated threats of physical harm to Riley by Annabile and Palermo during 1962 and 1963 in connection with his awarding to them construction business on entirely unrelated construction projects. No knowledge or intent on Battaglia's part was ever demonstrated so far as threats of physical harm are concerned. No knowledge or intent on the part of Battaglia was shown so far as the existence of other construction projects was concerned. No notice to Battaglia that he was to meet such evidence was ever given by the indictment which charged that the conspiracy

involved in the case at bar began in or about July, 1964, (A. 19). A request for particulars in this regard was denied, and the denial is discussed by the majority opinion at A. 12, 13. The Court of Appeals' highly technical disposition of the request for particulars, and its surmise that the government would not have disclosed that the Petitioner was to meet highly prejudicial evidence of a sensational and inflammatory nature occurring prior to the commencement of the conspiracy charged, is not consistent with the prosecutor's argument to the jury (A. 953).

The prosecutor, in his rebuttal argument to the jury, said,

> "Mr. Walsh, too, said Riley said he was afraid of Shine. He was afraid of more than Shine because for years he had been threatened, 'the man wants this', 'the man wants that'."

Battaglia's counsel objected that Riley had said that he was afraid of Palermo and Amabile, and that's all, which objection was overruled. The basis of the objection is to be found in Riley's testimony under direct examination by the prosecutor at pages A. 564 through A. 566, where the government induced, finally, the answer of Riley,

> "No, the only reason I authorized the payment, I was afraid of Joe Shine." (A. 566)

("Shine" was a nickname for Amabile.) The prosecutor was permitted to argue, over objection, as follows:

> "* * * but when Riley was afraid of Shine, because of the law of conspiracy, which his Honor Judge Hoffman will instruct you on, he was afraid of Battaglia, and he was afraid of Evans.
>
> Mr. Walsh: I object. That is not the law of conspiracy.

The Court I will overrule the objection

Mr Walsh I submit the law is for your Honor to explain

The Court Yes, and I will explain the law to the jury

Mr Walsh Your Honor, I respectfully move for a mistrial, then, on the prosecutor's remarks, because the fear in Rales's mind cannot be imputed to someone else through law of conspiracy

The Court I will deny the motion" (A 953, 954)

Obviously, the prosecutor's conception of the law, from his argument, the Trial Judge's conception of the law, from his rulings on objections, and the Court of Appeals' majority opinion by Judge Cummings, are at variance with the cases cited in the majority opinion from the Second Circuit, *United States v Andalaschek*, 142 F 2d 503 (2nd Cir) 1944, and *United States v Falcone*, 109 F 2d 579 (2d Cir), and the opinion of this Court by Mr Justice Stone for a unanimous Court in affirming the Second Circuit in the *Falcone* case, *United States v Falcone*, 311 U S 205 This conflict should be resolved by this Court

In *United States v Crimmins*, 123 F 2d 271 (2nd Cir) 1941, the Second Circuit reversed a conviction for conspiracy to transport stolen securities in interstate commerce, even though there was sufficient evidence that the defendant had agreed to handle the stolen securities. There was no evidence, however, that the defendant knew of or would have tolerated the interstate traffic alleged.

Judge Hand ruled that absent such evidence, the defendant, clearly a partner in the venture, could not be held responsible for the means his co-conspirators used that made the venture a federal conspiracy. In this case, it is not even contended by the government that any evidence tended to bring home to Battaglia the fact of threats of

physical harm as a means of accomplishing the end of the alleged mutual plan. Nor were the 1952 and 1953 threats, made prior to the beginning of the conspiracy charged, related in any way to Battaglia, other than by the claim of vicarious responsibility under a misconception of the law of conspiracy. In the opinion in the *Crimmins* case, Judge Hand wrote,

> "It is never permissible to enlarge the scope of the conspiracy itself by proving, that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. . . . In the case at bar it might have been an implied term of the agreement that Crimmins should take bonds coming from any source; if it had been, he could have been found guilty of the conspiracy, for such an agreement would have dealt with the place of the theft, even though it did no more than provide that the place made no difference. A continued indifference to the source of the bonds, coupled with knowledge that in some cases they had come from beyond the state, would have been evidence of such an agreement. But that was not the situation. . . . The jury might have indeed concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in fact he did not make." *United States v. Crimmins*, *supra*, at 273. (Emphasis supplied.)

Crimmins is authority for the theory that a necessary element of a conspiracy to commit a federal crime is proof of the federal intent, that is, that there was specific intent to violate a federal law, and that without proof that would authorize the finding that such intent existed, conviction cannot stand. There is no proof of specific federal intent in this case, and the trial court refused to instruct

that this was required under the law. The Court of Appeals' opinion in this case is in direct conflict with the *Crimmins* decision and opinion.

In the view of the Petitioner, the prosecutor, the District Court, and the Court of Appeals amended the indictment by admission of evidence of which the Grand Jury was apparently unaware, that is, threats of violence prior to 1964, the year in which the conspiracy is charged to have commenced.

In the later trial of an indictment returned the same day that the indictment in this case was returned, the District Court required the government to produce the Grand Jury testimony of the witness Riley which was presented to secure the return of both indictments. This Grand Jury testimony does not contain mention of the threats of physical harm, App. 79-112. This Grand Jury testimony was denied to the Petitioner Battaglia and his co-defendants in the case at bar.

However the point contended for here, is that the prosecutor and the District Court, in effect, amended the indictment by introducing the evidence of vicious threats made by Amabile and a person not charged or mentioned in the indictment, as much as two years prior to the commencement of the conspiracy charged in the indictment, and made in furtherance of objects not charged in the indictment or known to the Petitioner, under the proof. It is respectfully submitted that under *Stirone* v. *United States*, 361 U.S. 212 (1960), the indictment herein was expanded and amended beyond the intent and knowledge of the Grand Jury, and thus a charge was presented to the petit jury which was not made by a Grand Jury as required by the Constitution. The denial of the bill of particulars, heretofore referred to, and discussed by Judge

Cummings for the majority in the Court of Appeals' opinion below, and the total failure to connect Battaglia with the testimony concerning these threat conversations and transactions, was certainly an amendment of the indictment and a failure to afford the Petitioner Battaglia notice of the nature and cause of the charge against him. It is the belief of counsel who tried the case, and it must have been the belief of the prosecutor, that the 1962 and 1963 evidence of various threats totally outside the scope of any charged purpose or knowledge of the Petitioner, was the crucial and decisive evidence in persuading the jury to convict, and indeed, causing the Trial Judge to become so outraged as to sentence the Petitioner to 15 years with a denial of bail immediately upon the return of verdict. The Court of Appeals, speaking through Judge Cummings concerning the admission of the 1962-1963 threats by Ambrile and Palermo, and Prumo's statements outside the presence of the defendants, says:

> "The District Court carefully instructed the jury that this testimony was limited to that purpose. Tr. 2564." (App. 13)

Chief Judge Swygert disagrees with the majority opinion that this "careful instruction" was given (App. 42). The Petitioner respectfully contends that Judge Cummings, in writing the majority opinion, misconstrues the purpose of any instruction on page 2564 of the transcript of evidence, and contained at A. 973.

It is presumed that Judge Cummings refers to the instruction that reads as follows, A. 973:

> "The testimony of the witness William Riley, relative to his fear was admitted solely for the purpose of showing his state of mind with reference to why money would be paid. If you find any was paid as charged in the indictment, and if you find this testi-

> mens that show a state of mind, then you can consider it for that purpose only and for no other purpose in this case. You are not bound by these statements of Riles in determining his state of mind, but you may consider all the facts and circumstances in determining the state of mind of Riles at the time he allegedly agreed to pay monies as directed according to the government's testimony to the defendant Amabile."

The Petitioner respectfully submits that this instruction was intended by the Trial Judge to advise the jury concerning the way that it should consider the testimony of Riles, at A 366, "No, the only reason I authorized the payment, I was afraid of Joe Shine", and his answers immediately preceding this conclusion that he was permitted to state and which was never stricken. If the instruction was intended to protect any one of the defendants on trial including the Petitioner from the 1962 1963 threats, the intention is carefully concealed, and would not have been sufficient (*Bruton v. United States*, 391 U.S. 123)

2. Refusal of The District Court To Order Production of Grand Jury Testimony of Key Government Witness, Contrary to Dennis v. United States, 384 U.S. 855 (1966).

During the testimony of the witness DiVito, counsel for the defendant Amabile moved for production of his grand jury testimony (A 195). At that time, he indicated that he desired the testimony for the same purpose as other materials required by law to be furnished to the defense for cross-examination. Government counsel suggested that they would submit a copy to the Court for *in camera* inspection. No *in camera* inspection was made and the Court of Appeals below has blamed counsel for defendants for such lack of examination, *United States v. Amabile*, 395 F.2d 47, 55. Such an interpretation of the record, we submit, is erroneous. In fact, counsel for defendants expressly requested that the testimony be sealed and marked as an

exhibit (App. 223-224). In the first instance, no opportunity was given to accept or reject the offer; as soon as the offer was made, the trial court requested legal authority from the defense, which the defense agreed to furnish (A. 195). The following then transpired:

"The Court: All right.

Now, Mr. Bellows, I sustained an objection to your motion that the government be required to produce for the examination of the defense lawyers the transcript of the testimony of this witness before the grand jury, and I am going to adhere to that ruling. I will save you all of the research that you were going to do during the luncheon recess. I call your attention to Rule 16 as amended of the Criminal Rules and it does provide, Mr. Bellows, that the recorded testimony of a defendant before a grand jury may be produced by way of discovery and inspection. Moreover, in my opinion a transcript of a witness' testimony before a grand jury is not a statement within the meaning of Subsection (e) of Section 3500.

Mr. Walsh: Your Honor, may I join in Mr. Bellows' motion for the production of the grand jury minutes on behalf of Mr. Battaglia and I would urge as authority Dennis v. United States at the last term of the Supreme Court.

The Court: I will stand on my ruling. You may join and I deny your motion.

Mr. Bellows: Your Honor, may I ask that the grand jury testimony be sealed and impounded, your Honor, for whatever purposes we may need it?

The Court: I haven't any authority to do that. You may ask.

Mr. Bellows: I am asking.

The Court: And I deny your request.

Mr. Walsh: Can it be marked as an exhibit?

The Court: No, because I rule it is not properly here, if it were here, or if it is here." (App. 223-224)

The majority opinion noted that counsel for Battaglia did not specifically request production of LaKey's and Riley's Grand Jury testimony. We respectfully submit that the record, considered as a whole, shows that the petitioner did not waive his claim with regard to LaKey and Riley. When counsel for the defendant, Amabile, requested the Grand Jury testimony of the witness, LaKey, the court stated,

> "I think I have already told perhaps it wasn't you but another lawyer. I deny your motion." (App. 390)

A similar motion for the production of Riley's Grand Jury testimony was denied in the same cursory fashion (App. 689).

It would be unrealistic for this Court to hold that the petitioner, Battaglia, waived his request for Grand Jury testimony when the court had specifically informed all counsel that as a result of his research, no Grand Jury testimony was to be made available (App. 233-234). In the atmosphere in which this trial was conducted, to run the risk of ridicule in front of the jury, would be, we submit, onerous. cf. *Sanchez* v. *United States*, 293 F.2d 260 (8th Cir. 1961); *Deadu* v. *United States*, 46 F.2d 417 (4th Cir. 1931).

We also submit that the majority opinion of the Court of Appeals adopts too narrow a view of *Dennis* v. *United States*, 384 U.S. 855. The majority opinion of the Court of Appeals at Page 315 of *United States* v. *Battaglia*, 394 F.2d 304, states that,

> "No particularized need for this testimony was shown, nor was there any showing that the ends of justice required production."

We respectfully submit that the elements set forth in *Dennis* v. *United States*, 384 U.S. 855 requiring disclosure are present here.

1. The events to which the testimony in question related occurred between 1962 and 1964 when the Grand Jury testimony was taken in 1966 and the trial testimony given in 1967.

2. The motions in question related to key government witnesses. The charge could not have been established on the basis of evidence, exclusive of the testimony of these witnesses.

3. The testimony of the witnesses concerned conversations and oral statements made in meetings. They were largely uncorroborated.

4. Riley, DiVito and LaKey were accomplices, if believed, and had stated reasons for hostility toward the defendant.

It is therefore the position of this petitioner that his request for Grand Jury testimony came within the scope of *Dennis* v. *United States* and that the decision of the Court of Appeals in this case is in direct conflict with the decisions of Courts of Appeals in at least four (4) other circuits. See: *United States* v. *Youngblood*, 379 F.2d 365 (2nd Cir. 1967); *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir. 1967); *Cargill* v. *United States*, 381 F.2d 849 (10th Cir. 1967); *Worthy* v. *United States*, 383 F.2d 524 (D.C. Cir. 1967).

There can be no doubt that the petitioner, Battaglia, was prejudiced by the refusal of the trial court to comply with *Dennis* v. *United States* and its refusal to require the government to turn over to the petitioner, for purposes of cross-examination, the Grand Jury testimony of the three

(31 witnesses). Subsequent to the trial of this case, in another prosecution entitled *United States v. Amabile, et al.*, 67 CR 96, the same district judge required, under the authority of *Pennos v. United States*, that the government turn over to the defendant Grand Jury testimony of the witness Riley. This Grand Jury testimony is incorporated as an appendix to this Petition (App. 29 *et seq.*). A reading of this testimony discloses that none of the threats allegedly made by Palermo and Amabile in 1962 were related to the Grand Jury by the witness Riley in his appearances before that Grand Jury which returned indictment against Amabile and Palermo for that extortion. This failure of Riley to even mention these alleged threats could have provided a terrible field for cross-examination by counsel for Battaglia.

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Jencks v. United States*, 353 U.S. 657, 667, cited with approval, *Pennos v. United States*, 384 U.S. 865, 872 (footnote 19).

It would also make a powerful jury argument to discredit Riley.

Subsequent to the Court of Appeals' original decision in this case, the Court of Appeals adopted a rule in *United States v. Amabile*, 395 F.2d 47, following *United States v. Augenblick*, 379 F.2d 330 (2nd Cir. 1967) giving prospective application to *Pennos v. United States*. We respectfully submit that this prospective application of a

decision of the Supreme Court of the United States by the trial judge and the Court of Appeals is in error. First, the Supreme Court has not indicated in any of its opinions that *Dennis* is to be given only a prospective application. Although the Court of Appeals may have the right to time its own rulings it should not be permitted and does not have the right to control the rulings of the Supreme Court. In any event, pure prospectivity of the sort imposed here is particularly inappropriate since the use of Grand Jury testimony in cross-examination affects "the very integrity of the fact finding process"; *Lankford* v. *Walker*, 384 U.S. 618, 639; *Johnson* v. *New Jersey*, 384 U.S. 719, 728, the chief criterion the court has used in rejecting requests for prospective application. *Gideon* v. *Wainwright*, 378 U.S. 335; *Jackson* v. *Denno*, 378 U.S. 368. In addition thereto, the *Dennis* holding was presented to the trial judge as the law at the time of trial (A. 233), which was not the law at the time of the trial in *Youngblood*.

3. Denial of Cross-Examination Authorized by This Court's Decision in Smith v. Illinois, 390 U.S. 129.

It is submitted that the District Court was sustained by the majority of the Court of Appeals in its commission of fundamental reversible error in denying the defendants, including the Petitioner, the right to inquire as to the residence of the witness Riley.

During the cross-examination of Riley, by the attorney for Battaglia, the following occurred:

> By Mr. Walsh:
>
> Q. Where do you live now, Mr. Riley?
>
> Mr. Lamendella: I will object, your honor, and I ask to be heard out of the presence of the jury.
>
> The Court: Without a hearing, I will sustain the objection. (A. 723).

At the time of trial, *Smith* v. *Illinois*, 390 U.S. 129 had not been decided. However, *Alford* v. *United States*, 282 U.S. 687, had been the law since 1931, yet the trial judge refused this rudimentary inquiry. In *Smith* v. *Illinois*, 390 U.S. 129, the Supreme Court, relying on *Alford* stated at page 131:

> "In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

Since the decision in *Smith* the Seventh Circuit Court of Appeals has been faced with a similar question in *United States* v. *Parelli*, 407 F.2d 735 and *United States* v. *Palermo*, 410 F.2d 468. In both cases the convictions were reversed.

In *Palermo* the Seventh Circuit Court stated at page 472:

> "*Alford* v. *United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), and *Smith* v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), require reversal where the district judge refuses to allow questions as to a witness' address and present employment since they are threshold questions of cross-examination. 'The purpose of the inquiry is to make known to the jury the character, veracity or bias of the witness. * * *' Since there is no requirement of materiality,

it is not necessary to show the possibility of the witness being in custody in order to make such inquiry.' *United States* v. *Varelli*, 407 F.2d 735, p. 749 (7th Cir. 1969)."

In both cases, however, the Court of Appeals majority adopted the limited interpretation of *Smith* as expressed in the concurring opinion of Mr. Justice White 390 U.S. 129, 133-134 and held that, under certain circumstances, the right to inquire as to residence is not absolute. However, we submit that such inquiry was required here.

The indictment charged the conspiracy to have commenced "on or about July, 1964", and the only threats of record, according to the testimony of Riley, were conversations with Palermo, not a defendant in this case, and Annabale in 1962. There was no showing that the petitioner, Battaglia, ever took part in any threats to anybody, or that he even knew Annabale and Palermo at the time of their alleged threats, and certainly there was no proof that he had knowledge of such threats, nor was there any basis for such inference in the evidence.

Under these circumstances, it was wholly appropriate to cross examine Riley upon his present address in an attempt to investigate his present relationship to the Government, so that the witness could be shown in his true setting for the benefit of the jury.

The peremptory and arbitrary sustaining of objection to the questions concerning Mr. Riley's residence address was violative of the logic and reasoning of the cases cited, and requires a new trial.

The prosecutor, in making his objection, asked for a hearing out of the presence of the jury, and the trial Court, as shown above, said: "Without a hearing, I will sustain the objection." This aggravated the prejudice that accrued, since it indicated to the jury that the Judge was well-con-

vinced that this witness had legitimate fear of reprisal from the defendants. The remarks should not have been made, and it was error to rule peremptorily and arbitrarily without even a vestige of showing that there was present danger in 1967 by reason of unfulfilled threats by a non-defendant in 1962-63.

4. The Trial Court's Corrective Inquiries of the Jury Collectively, As To Whether the Flood of Prejudicial Publicity Had Reached Any of Them, Did Not Amount to an Inquiry Concerning Prejudicial Publicity, But Rather an Inquiry As To Whether the Jurors Were Guilty of Contemptuous Disregard of the Court's Orders.

The trial of this case was attended by an unusual volume of publicity. During the trial, numerous headline articles appeared:

"FBI DRIVE ON MOB HERE TO GAIN NATIONAL SPOTLIGHT"

"HOW 2 BIG-TIME HOODS GOT THEIR NICKNAMES"

"BATTAGLIA EXTORTION CONSPIRACY TRIAL HEARS OF PAYOFF"

"TESTIFIES HOOD REQUIRED FAN FREE PAYOFF"

"WITNESS GIVES INSIDE LOOK AT MOB BUSINESS"

"MOB MUSCLE DESCRIBED BY ITS FRONT MAN"

"SYNDICATE STOOGE TELLS OF TERROR TACTICS"

"INFORMER GRILLED, STICKS TO EXTORTION TALE"

"HOODS TRY TO BLACKEN WITNESS"

"BUILDER IN TEARS AS HE TELLS OF TERRORISM"

"EXECUTIVE RELATES HOW MOB CAUSED HIS FINANCIAL RUIN"

"BUILDER TELLS JURY HOW BATTAGLIA HELPED IN, RAN HIS FIRM"

"TRIAL FINDERS BATTAGLIA AS MOB'S NEW BOSS"

"WITNESS FINGERS BATTAGLIA AS NEW SYNDICATE BOSS"

"BATTAGLIA ANONYMITY IS PIERCED BY TRIAL TESTIMONY"

"CROSS EXAMINATION OF [illegible]"

"FORCED TO AID HOODLUMS IN DEAL, WITNESS BATTAGLIA PUT UP MONEY"

"JUDGE RULES IN BATTAGLIA ACQUITTAL BID"

"BATTAGLIA CASE ACQUITTAL DENIED"

"BATTAGLIA LOSES ACQUITTAL PLEA"

These articles and others were reproduced as an Additional Appendix in the Court of Appeals and have been filed in this Court as part of the record.

In *United States* v. *Palermo*, 410 F.2d [illegible] at page 471, the Seventh Circuit Court of Appeals set the standards that must be followed when publicity of such nature appears during trial.

> "The trial judge was careful in admonishing the jury every day not to read any newspapers or listen to any news accounts. While he was requested to ask the jury either as a whole or individually, whether they had

> read or heard any publicity, he refused because the defendants had opposed the government's motion to sequester the jury. United States v. Accardo, 298 F. 2d 133 (7th Cir. 1962), and Margolies v. United States, 40[illegible] F. 2d [illegible] (7th Cir. 1960), hold that at a minimum, the trial judge must question the jury as a whole when prejudicial publicity is brought to his attention. See also United States v. Rizzo, 300 F. 2d 409 (7th Cir. 1962). Warning the jury without questioning them is insufficient."

Although the trial court was requested to interrogate the jurors concerning such publicity, he did so on only one occasion during the trial when he interrogated as follows:

> "Good morning ladies and gentlemen of the jury. I told this morning that I should call your attention to my orders which have been directed to you in this case more especially with respect to reading the newspapers. As you all recall, I am certain, at least once a day and on some days as many as four times I order the members of the jury, among other things, not to read the newspapers. I want to ask this morning and please understand that this is no reflection on any of you and I don't mean by asking it to imply that my orders have not been complied with but I ask each and every one of you whether you have complied with my several orders since this trial commenced not not read the newspapers?
>
> If you have read the newspapers, will you please raise your hand.
>
> No juror has raised his hand, hence, I conclude that you have carried out my orders and you have not read any newspapers since you have started your service in this case." (A. 613-614)

The constant reference in his interrogation to his orders, we submit, was inherently coercive.

As was stated in the American Bar Association Project on Minimum Standards for Criminal Justice relating to fair trial and free press at page 145,

"It is important, however, that the method of separate questioning proposed for the initial voir dire in section 3.4 (a) be followed here and that the court not adopt a practice such as that employed in *Smith* v. *United States* where the trial judge asked anyone who 'violated the instructions of the Court' to raise his hand. The necessity of separate questioning has been emphasized in several cases, notably in *United States* v. *Accardo*, where the appellate court stated:

> 'There is no certainty that the jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity . . . [I]ndividual interviews would have tended to overcome reluctance to speak out.' "

We respectfully submit that the interrogation conducted by the judge was exactly the same as that condemned by the American Bar Association and was completely ineffective.

We therefore respectfully submit that an application of *Palermo*[1] and *Margoles*,[2] requires reversal.

The Trial Court was alerted to the voluminous publicity by newspapers, TV and radio concerning the defendant and his impending trial, and the trial once it started. At page A. 48 the motion of the petitioner Battaglia to re-set trial because of prejudicial publicity filed April 17, 1967 just prior to trial, is set forth. It continues to Page 52 and describes various items of publicity and requests a continuance until its abatement, or to take such other appropriate steps as are provided in *Sheppard* v. *Maxwell*, 384 U.S. 333, 363, 16 L.Ed. 2d 600, 620.

At A. 52 there appears a motion for mistrial or alternative relief and protection from prejudicial and inflam-

[1] *United States* v. *Palermo*, 7 Cir. 410 F 2d 468.

[2] *Margoles* v. *United States*, 7 Cir. 407 F 2d 727.

matory publicity, filed April 25, 1967, while evidence was being taken in the original trial. This motion continues to A 34, and again requests the Court to take the appropriate measures for trial courts as prescribed by the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333, 357-363, 16 L. Ed. 2d 600 at Pages 617-620. Items of newspaper publicity are referred to and described in the motion. These items contain untrue and untrue descriptions of purported facts proved at the trial, and it brought to the attention of the jurors undoubtedly the so-called news items would prejudice the petitioner's right to a fair trial. This motion was brought on for hearing before the Court at 2:00 P.M. on April 27, 1967, and the colloquy and arguments in connection therewith appear at A 591 and continues to A 609.

On that day, April 27, 1967, there appeared in the Chicago Daily News an account of the testimony of Chief Judge Campbell of the Northern District of Illinois before a Committee of Congress to the effect that his sentence of one Giancana had compelled new leadership in a so-called "syndicate". This news item was accompanied by an article by John Justin Smith, a writer for the Chicago Daily News, stating that the testimony of Judge Campbell fitted in well with the trial of the petitioner Battaglia, and went on in an obviously derogatory fashion so far as Battaglia was concerned, with the obvious purpose of prejudicing his position in the eyes of any reader. (A 592-593)

On April 28, 1967, Judge Hoffman read into the record his memorandum opinion deciding that motion.

It is respectfully urged upon this Court that Judge Hoffman's remarks during the colloquy and his memorandum in support of the motion, demonstrate that his philosophy

and rulings were aimed to be and were in conflict with the authorities on the subject, *United States* v. *Accardo*, 298 F 2d 133; *Marigolis* v. *United States*, 307 F 2d 721; *United States* v. *Rizzo*, 199 F 2d 199; *United States* v. *Palermo*, 410 F 2d 468; *Janko* v. *United States*, 366 U S 716; *Marshall* v. *United States*, 360 U S 310; *Estes* v. *United States*, 381 U S 532; *Sheppard* v. *Maxwell*, 384 U S 333

The Court is further directed to the following statement by the Trial Judge appearing at A 613 and 614

> "The Court: Good morning, ladies and gentlemen of the jury.
>
> "I feel this morning that I should call your attention to my orders which have been directed to you in this case, more especially with respect to reading the newspapers. As you all recall, I am certain, at least once a day and on some days as many as four times I order the members of the jury, among other things, not to read the newspapers. I want to ask this morning, and please understand that this is no reflection on any of you and I don't mean by asking it to imply that my orders have not been complied with, but I ask each and every one of you whether you have complied with my several orders since this trial commenced not to read the newspapers?
>
> "If you have read the newspapers, will you please raise your hand.
>
> "No juror has raised his hand, hence, I conclude that you have carried out my orders and you have not read any newspapers since you have started your service in this case.
>
> "Mr. United States Attorney, will you bring your witness to the stand.
>
> "Mr. Lamendella: Yes, your Honor."

(See *United States* v. *Levi*, 177 F.2d 833, 835 (7 Cir.) and *United States* v. *Accardo*, 298 F.2d 133.)

In the case at bar, Judge Hoffman predicated his inquiry as it appears above with the warning of his order, and the actual inquiry was whether or not the jurors "had complied with my several orders since this trial commenced not to read the newspapers".

This inquiry was made in a courtroom with a full audience including a press table inside the jury rail with no less than 6 reporters from the news media of the City of Chicago. No other attempt was made by the Trial Judge to ascertain whether the content of these prejudicial news articles had been brought to the attention of the jurors or any of them. The principle expressed in *Marshall* v. *United States*, 360 U.S. 310, 312, 313,

> "The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence . . . It may indeed be greater for it is then not tempered by protective measures.',

was not adhered to.

In *Janko* v. *United States*, 366 U.S. 716, the Supreme Court reversed a conviction involving comparatively mild publicity. While it is true that this was on the Solicitor General's memorandum confessing error, the Supreme Court does not reverse simply on confession of error, but acts upon the record. In the *Janko* case, the Trial Court did make a general inquiry which the government acknowledged would most likely be answered by the jurors in the negative. It is submitted that Judge Hoffman's question was so framed that it would likely induce either a negative answer or no reaction at all. In the case at bar, in response to the Judge's question as to whether the jurors

had followed his orders, no juror raised a hand, and this was taken by the Trial Judge as exoneration of the question of overwhelming prejudicial publicity in the news media.[1]

The defendant urges that the obvious prejudice to Battaglia in the case in which he was tried, would indicate that refusal of the Trial Judge to do any more than make a general inquiry as to whether his orders had been obeyed, was insufficient protection to preserve a fair trial or to overcome the probability that unfairness had occurred.

5. The Trial Judge's Mid-Trial Incomplete Instruction On How To Consider Conspiracy Evidence.

The introduction of proof in a conspiracy case, due to the obtuse nature of the proof in such cases, must be made clear by unequivocal instructions to the jury, as to the consideration of the evidence against individual defendants. The court initially limited the introduction of acts and declarations only to those persons who might have been present when the act or declaration occurred (A. 114). But, it was the apparent theory of the court that once a person was present during an act or declaration all subsequent acts and declarations were admitted against him. (*e.g.* A. 115, 118, 119, 127, 129, 164, 170). Yet, when the government atempted to have all acts and declarations of all defendants considered against everyone, the court refused to do so because there was no evidence of the alleged extortion or obstruction of interstate commerce. (A. 184-

[1]With respect to whether there was intent to protect the defendants or intent to detect a violation of the trial Judge's orders, or an attempt to prevent mistrial, implicit in the inquiry, the Court is requested to consider the Petition for Certiorari No. 968, Oct. Term 1970, pages 20-25.

6). However, later in the trial upon motion of the government the Court over the objections of the defendants, instructed the jury as follows:

> "Before we proceed with the taking of further testimony in this case, I have a direction and instruction to give you, to make to you.
>
> You will recall during the course of this trial certain testimony was admitted in evidence only as to one or more of the defendants, and you were instructed at that time that such evidence was not then to be considered against any defendant to whom the evidence did not pertain.
>
> It is now my responsibility under the law, to instruct you that such evidence is admissible against all of the defendants as evidence in connection with the alleged conspiracy charged in the indictment, whether or not each of the defendants was present when the acts or conversations or incidents testified about, were done or carried on. You may consider then such evidence as pertaining to all of the defendants." (A. 741 742).

Thus the jury was permitted to consider as evidence against the defendants Battaglia and Evans, the alleged threats which had been made by the defendant, Amabile and the unindicted person, Palermo in 1962 even though the indictment charged a conspiracy, and the government contended that the conspiracy began, in July of 1964.

A mere ruling on admissibility of evidence, even if correct, should not instruct the jury on how to consider it, prematurely, and contrary to the final charge.

While the Trial Judge recognized this as an instruction, and paid lip service to Rule 30 F.R. Cr. P., his inquiry concerning objection, in the presence of the jury, and his failure to inform counsel of the contents of the instruction before giving it, violated the rule.

By virtue of this instruction, the province of the jury was invaded so that they need not consider whether a conspiracy had even been established or that a defendant was a member of that conspiracy before they could consider acts and declarations of co defendants made outside of the presence of the defendant. This is obvious error. *Della Paoli* v. *United States*, 352 U.S. 232, 237; *Glasser* v. *United States*, 315 U.S. 60, 74; *Blumenthal* v. *United States*, 332 U.S. 539, 551. Such an instruction which was entirely uncalled for, because the court had been admitting evidence against all defendants, (A. 70) could only serve as a direction to the jury that a conspiracy had been proven and that each defendant was a member of that conspiracy. An instruction similar to this was condemned by Judge Schnackenberg in *United States* v. *Pronger*, 7 Cir., 287 F. 2d 498.

Nowhere in the court's charge to the jury either during trial or in its final charge to the jury was the jury instructed that they could not consider the acts or declarations of a co-defendant made outside the presence of a defendant against the absent defendant unless they first found that a conspiracy existed and that the defendant was a member of that conspiracy, and that the statement was in furtherance of the conspiracy. In fact, the court refused to so instruct the jury. Battaglia Instruction AA, BB, Evans—5, (A. 62-64). This failure so to instruct constitutes reversible error. *Lutwak* v. *United States*, 344 U.S. 604, 617; *Krulewitch* v. *United States*, 336 U.S. 440, 445; *United States* v. *Wortman*, 7 Cir., 326 F.2d 717, 725.

We, therefore, respectfully submit that since the instructions here were an equivocal, misleading and erroneous statement of the law, that this conviction must be reversed. *Bollenbach* v. *United States*, 326 U.S. 607, 613.

The affirming opinion and decision below conflicts with *Lovelace v. United States* (D.C. Cir.), 200 F.2d 186, and *Terminal Railroad Association of St. Louis v. Maxwell*, (8 Cir.), 122 F.2d 254, 258.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 1, 1950

APPENDIX

APPENDIX

APPENDIX

OPINIONS

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1967 — January Session, 1968

Nos. 16312 and 16313

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

vs.

SALVATORE BATTAGLIA and DAVE EVANS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 9, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. In February 1967, defendants Dave Evans, Salvatore Battaglia and Joseph Anatole were indicted for conspiring with each other and with non-

defendant Rocco Pranno to violate the Hobbs Act.[1] The gist of the conspiracy charge was that defendants obtained $48,500 from the Riley Management Corporation by extortion. As required by the statute, the indictment also charged that the conspiracy affected interstate commerce, particularly with respect to that firm's construction of the King Arthur Apartments in Lansing, Illinois. The three defendants were found guilty by a jury. Evans' and Battaglia's appeals were heard together and are disposed of in this opinion. Amabile's appeal has not yet been heard.

Because Evans and Battaglia assail the sufficiency of the evidence, it must be summarized in some detail, viewed in the light most favorable to the Government. The evidence showed that William Riley was president of the Riley Management Corporation and that his company was building the King Arthur Apartments in Lansing, Illinois. Since 1962, defendant Evans had been one of his superintendents of construction and was assigned to the Lansing job in June 1964. At that time Riley and Evans discussed letting the sewer contracts for the Lansing apartments. Riley told Evans to line up

[1] In pertinent part, the Hobbs Act provides (18 U.S.C. § 1951):

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

subcontractors but to keep it secret "from the boys in Melrose Park," specifically from defendant Amabile (also known as Joe Shine) and from Nick Palermo. Riley told Evans that if Amabile and Palermo learned of the project, Riley would quite possibly be forced to use them again as subcontractors. Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family. Evans promised to keep the King Arthur Apartment information from Amabile and Palermo. However, a few days later, Riley was requested to go to the office of the Melrose Park Plumbing Company to meet Nick Palermo. Riley acceded. Both Palermo and Amabile were at the meeting. Palermo insisted on their receiving the plumbing contract for the Lansing project. Amabile said that otherwise he would stop Riley's other apartment building projects underway in Northlake and Westmont, Illinois, and that Riley "would be walking the streets with a candy cane." They told him they knew where Riley's mother lived and where his children went to school and that they had a baseball bat to handle "wise guys" like him.

A few days later, Riley complained to Evans about the leak to Amabile and Palermo. Riley told Evans that the Melrose Park group was not to receive any Lansing work from Riley Management Corporation. In August 1964, Riley instructed Evans to obtain a sewer contractor that was "foreign" to Amabile and Palermo.

Amabile had told Mike DiVito, a sewer contractor, that Amabile could not get the Lansing sewer work if DiVito's name were to be on the contract. Amabile advised DiVito and co-conspirator Rocco Pranno to come up with "a good clean fellow" if they were to obtain the business. They suggested Henry La-Key, an experienced

construction foreman. In September 1964, La-Key was hired by Pranno and DiVito as construction superintendent for a brand new firm, Carlson Construction Company, with the title of president.

DiVito said he and Pranno met with Evans and Amabile at Amabile's apartment in mid-September.[2] Pranno explained to Amabile that La-Key was "clean," but Amabile said that before giving Pranno and DiVito the Lansing sewer job he wanted $20,000 in cash. After looking at Evans' figures, DiVito told Pranno that there would be $20,000 in cash above Pranno's and DiVito's costs and profits for the job. Thereupon Pranno told Amabile that he would give him the $20,000 in cash and Amabile accepted the deal. Afterwards, Pranno told DiVito that Evans was Amabile's "guy" and that DiVito should never say anything in front of Evans because it would get back to Amabile.

La-Key testified that he attended a September meeting at Amabile's apartment with Evans, DiVito and Amabile. Amabile said that he was giving the Lansing sewer job to DiVito and Pranno and cared about nothing except getting his $20,000 "off the top." In La-Key's presence, DiVito later relayed the message to Pranno about Amabile's demand for $20,000. Pranno directed La-Key and DiVito to meet with Amabile and Evans at the El Morocco lounge. At that meeting DiVito told Amabile that there would not be enough money in the contract to pay him $20,000 "off the top." Amabile then instructed Evans to figure a way to obtain more money from the job. Evans tore up the original contract and wrote a new contract, raising the price from $150,000 to $199,600.

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[2] This may be the same Amabile apartment meeting described *infra* by La-Key.

Pranno gave DiVito and La-Key approximately $13,000 to open a bank account for Carlson. In September 1964, Evans advised Riley that he had selected the Carlson Construction Company as the sewer contractor, that its reputation was excellent, and that it was operated by Henry La-Key. Thereafter, Carlson Construction Company was awarded the sewer contract for about $150,000, to be paid directly to Carlson by a suburban savings and loan association through pay-out slips issued by Riley's company. Carlson commenced the Lansing work in September or October 1964.

In mid-October, Evans told La-Key that the only contracts Evans let at Lansing were the ones Amabile told him to. Evans told La-Key that he did not want Riley to know that Evans knew Amabile. In November, Amabile told La-Key that Evans worked for Amabile, that Amabile had placed Evans in Riley's office, and that Evans would do whatever Amabile told him to do.

Before making the first draw from the savings and loan association, La-Key told Amabile that the draw would be for $57,000. The next day, Amabile and La-Key drove to the hospital where Evans was a patient. Amabile told La-Key that Amabile was going to give $5,000 to Evans as his cut on the job, instead of $7,500. At the hospital Amabile gave Evans a "wad of bills." Evans reduced the estimate for the first draw by approximately $10,000.

On November 12, 1964, La-Key received the first draw for $47,517.97 from the savings and loan association. He deposited $39,000 in Carlson's payroll account, retained $517 for his wages, and gave $8,000 to Rocco Pranno. Three days later, on Amabile's instructions, he drew out $20,000 from Carlson's account and gave it to Amabile.

In late November or early December, La-Key accompanied Amabile to a farm in Pinegrey Grove, Illinois, where Amabile introduced La-Key to Battaglia as "running the job for them" in Lansing, Illinois. La-Key heard Battaglia ask Amabile why Evans was getting "that kind of money." Amabile explained that he had made a deal with Evans who had "got us the job." Amabile also said he had promised Evans $7,500 and that he would take care of it. The next morning La-Key mentioned to Evans that he had been at Battaglia's farm, and Evans warned him not to talk about it. Later, Pranno explained to Amabile that La-Key should not have been taken to the farm. When Pranno attempted to hit La-Key, Amabile stopped him, saying that he had La-Key down to the farm and that "the man [Battaglia] says he is OK."

Prior to the first draw, Pranno, DiVito and La-Key borrowed $5,000 because Carlson had run short of money. Pranno gave $4,500 of this amount to La-Key to deposit for Carlson. This loan was not repaid by January 1965. Later that month Pranno told Amabile about this in DiVito's presence and asked Amabile to locate La-Key so that the loan could be repaid. Several days later Pranno told Amabile that he was going to "the farm" to see "the man" in order to have Amabile obtain $5,000 from La-Key to pay back the loan. At the resulting Battaglia farm meeting, attended by Amabile, Pranno and DiVito, Pranno mentioned that $20,000 from the Lansing sewer job was intended for Battaglia, who then nodded. The second time the $20,000 was mentioned for Battaglia, he said "yes." Battaglia also said:

> "'Well, I don't think Hank La-Key is such a bad guy, I like him, I like to work with him,' that they had other things coming up, and that they could use him again because he was clean."

He told Pranno that he would see what he could do for him as to the $5,000. On the drive back from the farm, Pranno told DiVito that he thought Amabile was short-changing Battaglia and keeping $10,000 of the $20,000 for himself.

In January 1965, La-Key advised Evans that Carlson did not have enough money to pay for necessary materials. Evans told La-Key not to worry, saying:

> "'I will talk to Joe Shine [Amabile] and Joe Shine will talk to the man [Battaglia or Riley[3]]. We will see that the money is in the bank for you.'"

That same month Amabile told La-Key to prepare the papers for the second draw. La-Key said that the second draw would be for $60,000. Amabile said this was too high and that he would determine how much it should be and would straighten it out with Evans. That same night, Evans went to La-Key's home and changed prices to bring the draw down to $48,000. Evans told La-Key to present the second draw papers to Sol Meltzer, Riley's financial officer. However, Meltzer refused to authorize this draw. Thereupon, La-Key went to see Amabile. Evans was present while La-Key told Amabile what had happened. The next morning La-Key picked up Evans. They entered Riley's office separately. Riley said that he would authorize a pay-out only when Carlson had paid its suppliers. At this meeting La-Key told Riley that the cost of the job had gone up to $200,000. Evans explained that this was because "complications set in on the job."

La-Key thereupon reported to Amabile that the second draw was still not authorized. Amabile told La-Key to accompany him to Riley's office the next morning. On the

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[3] In other instances in the record, the evidence supports a finding that the expression "the man" refers to defendant Battaglia.

following day Amabile told Riley that he had to pay La Key because "the man" [Battaglia] wanted La Key paid. Amabile said that, otherwise there would be "all sorts of trouble." Because of his fear of physical harm and economic collapse, Riley authorized the second draw of $48,812.48. This was the sum mentioned in the indictment and was deposited by La Key in a Carlson account. A few days later, Amabile instructed La Key to draw out $[illegible]. La Key thereupon obtained $3,000 in cash and a certified check for $[illegible]. Amabile insisted upon all cash and ordered Evans to accompany La Key to cash the check. After the $[illegible] check was cashed, La Key and Evans went to Amabile's apartment, and La Key gave Amabile the $[illegible]. Amabile then gave La Key $3,000, of which La Key gave Evans $1,000. Amabile told La Key to take a vacation, and he went to Florida. Shortly thereafter, Evans advised La Key to return to Chicago, at Amabile's request. Amabile then complained that La Key had not been paying Carlson's bills, thus getting Amabile in trouble with Riley and "making Dave Evans lose his job. You are taking my man [Evans] right out of Ri[illegible]'s." La Key then told Amabile that there was no money in the Carlson account because Amabile had bled it.

A few days later, La Key complained to Evans that the Carlson bills were unpaid because of Amabile's actions. La Key asked Evans why he didn't get out of the business. Evans replied:

> "I can't get out. I am in too deep with Joe Shine Amabile. I know too much about the other people. . . . I can't quit. I wish I could get back to my own job where I came from."

Evans then said that he wished he had never met Amabile and reiterated that he was in too deep to quit.

Sufficiency of the Evidence as to Evans

Evans and Battaglia concede there was enough evidence of a conspiracy to obtain money from Riley Management Corporation by fraud. Evans admits that there was sufficient evidence that he was a party to that conspiracy. He also admits that Amabile used extortion to induce Riley to authorize the second draw. However, Evans contends that there is no evidence to show that the extortion was pursuant to a conspiracy of which he was a member. We reject that contention.

On this record, it is obvious that Evans knew of Riley's fear of Amabile. Although Evans took the stand, he significantly never explained that evidence was not contemplated. La Key was told by Evans that he would talk to Amabile, and that Amabile would talk to "the man" (Battaglia or Riley in this instance; see note 3 *supra*) in order to get the second draw paid. Evans knew that Riley was unwilling to pay the second draw because Carlson's bills were unpaid, and that Riley was afraid of Amabile. The jury could properly infer that Evans knew Amabile would induce Riley through fear to authorize the second draw. After the second draw, La Key withdrew another $17,000 for Amabile, who then gave La Key $5,000, who in turn gave Evans $1,000.[4] Even though he may not have spoken to Amabile about the second draw, Evans' own statement to La Key showed his willingness to take part in a course of action which would cause payment by coercion. It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw. Cf. *Perrin* v. *United States*, 347 U.S. 1, 12-13. As in *Lefco* v. *United States*, 74 F.2d 66, 68, 69 (3rd Cir. 1934).

[4] Previously, according to La Key, Evans had received another "wad of bills" from Amabile.

Evans has resorted to a conspirator's common contention, made in extremity, that he was a party to a sub-conspiracy not charged in the indictment, but our digest of the evidence discloses evidence quite sufficient to sustain the allegations and finding of his participation in a single conspiracy to obtain money, encompassing extortion as well as fraud.

Evans has relied on *Stirone v. United States*, 361 U.S. 212; *United States v. Critchley*, 353 F.2d 358 (3rd Cir. 1965), and *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), certiorari denied, 365 U.S. 861. None is apposite. In *Stirone*, the Court condemned the variance between indictment and proof. As we have seen, the proof here is consistent with the indictment. In *Critchley*, the evidence did not show any threat at the critical time, so that there was no extortion. Here there was ample evidence that co-conspirator Amabile threatened Riley with violence to obtain the second draw, and of course Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy.[1] In *Carbo*, Gibson had legitimate business reasons for his association with the conspirators, whereas Evans' associations with Amabile were clearly for illegal purposes.

Sufficiency of the Evidence as to Battaglia

As noted above, during DiVito's, Pranno's and Amabile's February (or early March) 1965 visit to Battaglia's farm, Battaglia said he liked La Key and they could use him in other things because he was clean. From this, the jury could infer that Battaglia had embarked "on a criminal venture of indefinite outline." (*United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944)). He was commit-

[1] *United States v. Sansone*, 231 F.2d 887, 892 (2d Cir. 1956), certiorari denied, 351 U.S. 987.

ted to a long term relationship contemplating the use of La Key in numerous ventures. Battaglia admitted knowledge of Evans' panel role. He also acknowledged that he was to receive a $30,000 cut from Riley through the Carlson contract at Lansing. Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied. Battaglia was also the arbiter of disputes among the co-conspirators. Being an associate of Ansbale in this venture, Battaglia is properly chargeable with knowledge that his confederate, Ansbale, would resort to threats if necessary to extract money from Riley. Battaglia had to "take his chances" as to the methods used by the other co-conspirators. *United States* v. *Andolschek*, *supra*. As in *United States* v. *Kahaner*, 317 F.2d 459, 468, note 4 (2d Cir. 1963), certiorari denied, 375 U.S. 835, 836, "there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he [a co-conspirator who held the bribe money] was criminally responsible for the acts of the other conspirators and his own failure to perform more than a few overt acts would be immaterial." Evidence of knowledge of the details of the plan or of participation of others is not required. *United States* v. *Hickey*, 360 F.2d 127 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

Intent to Affect or Knowledge of Effect on Interstate Commerce

Battaglia insists that it was necessary to find that he intended to affect or had knowledge that the conspiracy would affect interstate commerce, and that there was insufficient evidence of such intent or knowledge. A similar argument was rejected in *United States* v. *Varlack*, 225

F.2d [illegible] (2d Cir. 1955). As we recently held in *United States v. Provenzano*, F.2d [illegible] (2d Cir. 1965):

> "All that must be proved, however, is that defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce."

The District Court charged the jury that "all that is necessary is that the natural effect of the acts committed pursuant to the conspiracy was to affect, delay or obstruct [interstate] commerce," and that the requisite effect on commerce would be found if the jury believed "beyond a reasonable doubt that the defendants' activities as shown by the evidence in any way or degree obstructed, delayed or affected commerce." These instructions were proper under the Hobbs Act. Neither Battaglia nor Evans argues that the extortion could have no effect on interstate commerce. Here, one of the means to accomplish the extortion was the threat otherwise to cause Riley Management Corporation "all sorts of trouble." Many interstate deliveries were being made to its Lansing project. If Amabile's threats to destroy Riley had been carried out, this interstate commerce would necessarily have been obstructed. The Hobbs Act covers such a situation. *United States v. Provenzano*, *supra*. Furthermore, the Riley company's reserves were depleted by the extortion. Since its business depended, in part, on ability to pay for interstate shipments to the Lansing site, the jury could infer that the extortion would have an effect on interstate commerce. Under the language of this statute (see note 1 *supra*), that is a sufficient nexus with interstate commerce.

Denial of Bill of Particulars

Evans' briefs do not contest the denial of requests Nos. 2 and 3 in his motion for a bill of particulars.*

* The other three requests were granted and the Government answered them.

However, Battaglia adopted these requests and argues that the District Court erroneously denied them. Specifically, Battaglia asserts that he was entitled to information about the 1982 and 1983 Palermo Anabolic threats to Riley with respect to his Northlake and Westmont, Illinois, projects. However, requests Nos. 2 and 3 provide:

> "2. State the acts or things done by the petitioner [Evans and, by adoption, Battaglia] by which he and the other named and unnamed persons, combined, confederated and agreed together to obstruct, delay and affect commerce as charged.
>
> "3. State the dates, times and places when and where the alleged acts set forth in paragraph 2 above were done or performed."

Even if the District Court had ordered the Government to answer these requests, the Palermo Anabolic threats would not have been revealed. Since Battaglia did not ask for this information below, he may not assert error on this request. Furthermore, none of the *five* requests in the motion for a bill of particulars covered this subject matter. Therefore, the Government was not required to respond as to it. No abuse of discretion has been shown with respect to the partial denial of this motion. *Wong Tai v. United States*, 273 U.S. 77, 82.

Conspiracy Instruction

During the early portions of the trial, the District Court refused to permit the Government to have the defendants' declarations considered against all of them. Later in the trial, upon motion of the Government, the Court instructed the jury as follows:

> "Before we proceed with the taking of further testimony in this case, I have a direction and instruction to give you, to make to you.

"You will recall during the course of this trial certain testimony was admitted in evidence only as to one or more of the defendants, and you were instructed at that time that such evidence was not then to be considered against any defendant to whom the evidence did not pertain.

"It is now my responsibility under the law, to instruct you that such evidence is admissible against all of the defendants as evidence in connection with the alleged conspiracy charged in the indictment, whether or not each of the defendants was present when the acts or conversations or incidents testified about were done or carried on.

"You may consider then such evidence as pertaining to all of the defendants."

Citing *United States v. Prunger*, 286 F.2d 498 (7th Cir. 1961), Battaglia complains that this instruction was a direction to the jury that a conspiracy had been proven and that each defendant was a member of that conspiracy. However, the last paragraph of this instruction referred to "the alleged conspiracy" and did not tell the jury that the Government had proved a conspiracy. A later instruction made it plain that the jury could not consider acts and declarations of one conspirator against the others unless the jury found the existence of a criminal conspiracy and that the acts and declarations were in furtherance of the conspiracy.

The *Prunger* case is not controlling here. The terms of the instruction in that case were dissimilar to those here, and any defect in that instruction was apparently not cured by a later instruction. Conspiracy instructions similar to those here were approved in *United States v. Stewart*, 287 F.2d 715, 719-20 (7th Cir. 1961), which reinforces our conclusion that the later instruction made the risk of prejudice too slight to justify reversal. *Prunger*

has been confined to a situation where the erroneous instruction was in effect given as part of the charge and does not apply where, as here, trial time intervened between the anecdotal comments and the final, proper charge. *United States v. Ellegretti*, 300 F.2d 254, 256 (7th Cir. 1962, *en banc*), certiorari denied, 381 U.S. 911.

Battaglia claims that the jury was not told that it could not consider acts or declarations of a co-defendant made outside the presence of a defendant against the absent defendant unless it found that a conspiracy existed and that the acts and declarations were in its furtherance, but an examination of the transcript shows that such an instruction was given.

Admission of Pre-indictment Threats Made by Amabile and Palermo and Admission of Statements of Co-conspirator Pranno

Battaglia also asserts that the District Court erroneously admitted Riley's testimony of 1962-1963 threats by Amabile and Palermo and erroneously admitted Pranno's statements outside the presence of the defendants. We agree with the Government that Palermo-Amabile threats were relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564).

As to Pranno, the evidence concerning his January 1965 visit to Battaglia's farm, as well as other evidence previously summarized, shows that he was a co-conspirator of Battaglia and Amabile, so that La-Key's and DiVito's testimony concerning Pranno's statements outside the presence of defendants was properly received.

Accomplice Instruction

Battaglia complains that the District Court's accomplice instruction advised the jury that DiVito and La Key were accomplices. The instruction was as follows:

> "I must tell you, ladies and gentlemen of the jury, that an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence. However, you should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict any defendant upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt."

This instruction does not say or imply that DiVito and La-Key were accomplices. The instruction obviously means that if a person is found to be an accomplice, his testimony should be scrutinized with special care. A similar instruction has been proposed by Judge Mathes for the use of the District Courts. 20 F.R.D. 244. Such cautionary instructions were advocated in *United States* v. *Bucur*, 194 F.2d 297, 305 (7th Cir. 1952); *Wainer* v. *United States*, 82 F.2d 305, 308 (7th Cir. 1936), affirmed, 299 U.S. 92, and *Rucci* v. *United States*, 12 F.2d 264, 265 (7th Cir. 1926). Battaglia relies on *United States* v. *Baldamus*, 177 F.2d 485, 487 (7th Cir. 1949), but there the district judge termed two named witnesses as accomplices. Here the jury had already been instructed that it was the exclusive fact finder, and there was sufficient evidence from which the jury could find that La-Key and DiVito were accomplices of the defendants. In this setting, the giving of this instruction was not erroneous.

Restriction of Cross-examination and Refusal to Admit Defense Exhibits

Battaglia assails the District Court's rulings restricting the cross-examination of DiVito, La Key and Riley; he also assails the court's refusal to receive certain defense exhibits. A study of the cross-examination of these witnesses shows that the District Court allowed defense counsel considerable latitude.

Battaglia's counsel attempted to show that a tax indictment had been dismissed against DiVito in return for his agreeing to be a government witness in this case. Battaglia's counsel cross-examined DiVito extensively about a "deal" to drop the income tax charge if DiVito testified for the Government in the instant case. Later the First Assistant United States Attorney in Chicago testified that the reasons for the Government's dismissal "were that Mr. DiVito's lawyer served us with that motion showing that he had paid his taxes, attaching the check and the receipt and it was obvious that we had no case * * *."[7] He also testified that the Assistant United States Attorney in charge of the DiVito case was satisfied that proof the tax had been paid in 1964 was a defense to that indictment. If Battaglia's counsel was still not satisfied why the DiVito indictment was dismissed, he could have also called the Assistant United States Attorney in charge of that matter.

[7] By allowing this testimony, the trial judge acted consistently with the rule that bias or interest of a witness is not a collateral issue, and that extrinsic evidence is admissible thereon. *United States* v. *Lester*, 248 F.2d 329, 334-335 (2d Cir. 1957); 3 Wigmore on Evidence (3rd ed. 1940) §§ 948-950, 1005(b); McCormick on Evidence (1954) § 40, pp. 85-86.

The District Court refused to permit the defense to put into evidence the court file and docket entries relating to DiVito's tax case, but they were merely cumulative and did not reveal any "deal." Hence their exclusion was not prejudicial to Battaglia.

Battaglia endeavored to show that La Key was responsible for the milking of the Carlson Construction and Equipment Company. The defendants were given ample opportunity to examine La Key regarding the balances in the Carlson bank accounts. The District Court did sustain the Government's objection to certain checks. But Battaglia was not prejudiced by this ruling, for the checks were already reflected by ledger sheets that had been received, thus enabling Battaglia's counsel to argue that La Key had looted the Carlson Company for his own personal gain. In addition, the checks were being offered in an attempt to contradict a witness on a collateral matter not relating to the $48,300 allegedly extorted. This is impermissible. *United States* v. *Masino*, 275 F.2d 129, 133 (2d Cir. 1960); *United States* v. *Sweeney*, 262 F.2d 272, 276-277 (3rd Cir. 1959). 3 Wigmore on Evidence (3rd Ed. 1940) § 979. Prior contradiction may be shown only on a matter material to the substantive issues of the trial. *Gordon* v. *United States*, 344 U.S. 414, 420, note 13. As noted there, a trial judge has "wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character." 344 U.S. at p. 423.

Next, Battaglia states that he was precluded from showing Riley's purchase price for the Lansing land. It is true that the real estate contract was not admitted by virtue of the best evidence rule. But earlier Battaglia had shown through Robert Biederman's testimony that the price was about $140,000. Since the disparity between the purchase

price and the price used in loan negotiations was already in the record, no prejudice stemmed from this ruling.

Battaglia complains too that Riley's February 5, 1960, bankruptcy petition should have been admitted. Again, the District Court had broad discretion to refuse it as a collateral matter. *United States* v. *Bender*, 218 F.2d 869, 874 (7th Cir. 1955), certiorari denied, 349 U.S. 920. Riley's bankruptcy petition supposedly stated that he owned no stocks or bonds as of that date, but this record does not show that the bankruptcy statement was "obviously perjured" as Battaglia claims. No abuse of the District Court's discretion has been shown in this exclusionary ruling.

Battaglia complains that in Amabile's cross-examination of Riley, Amabile was not permitted to show that Riley's October 5, 1965, statement to the Federal Bureau of Investigation did not refer to the 1962-1963 threats of Palermo and Amabile. However, Riley testified that he had advised the FBI of these threats and added: "I have only read two pages [of the October 5 statement] and I see it in there, yes, sir." If Battaglia's counsel considered the point worth pursuing, he could have called FBI agents Dahlman and Kotsos to prove the contrary. *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960.

In his reply brief, Battaglia's counsel contends that the Government should have granted his request for production of DiVito's grand jury testimony.[8] No particularized need for this testimony was shown, nor was there any showing that the ends of justice required production. Therefore, production was unnecessary. See *Dennis* v. *United States*, 384 U.S. 855, 868-875.

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[8] Battaglia's counsel did not request the production of La-Key's and Riley's grand jury testimony.

As to Battaglia's principal cases cited to show reversible error, in *Alford v. United States*, 282 U.S. 687, defense counsel was not permitted to establish that a prosecution witness was in government custody and therefore might expect consideration. In this case, the defense was permitted to show that both DiVito and Kiley were in government custody. In *Smith v. United States*, 232 F.2d 776 (6th Cir. 1956) and *United States v. Hogan*, 232 F.2d 906 (3rd Cir. 1956), the defense sought to cross-examine government witnesses who stood convicted of a federal offense, in an effort to show that they expected leniency in return for their testimony. The District Court refused to allow such cross-examination. In this case, Battaglia's counsel subjected DiVito to a lengthy cross-examination about the reasons for the dismissal of the tax evasion indictment against him. This also serves to distinguish *United States v. Musacchio*, 220 F.2d 129 (2d Cir. 1955), where such cross-examination of government witnesses was not permitted.

Gordon v. United States, 344 U.S. 414, *United States v. Rosenwasser*, 156 F.2d 580 (2d Cir. 1946), and *Meeks v. United States*, 163 F.2d 398 (9th Cir. 1947) deal with the exclusion of documentary evidence showing that the prosecution witnesses had been punished for violating federal law and were still subject to the jurisdiction of the court or agency which had imposed the punishment. In each case, the information contained in the documentary evidence tended to prove bias and was not otherwise present in the record. In this case, the District Judge remarked at one point: "I assume that the government is the only one who could voluntarily move for the dismissal [of the tax indictment against DiVito]." This statement, coupled with the extensive cross-examination of DiVito and the examination of the First Assistant United States Attorney in Chicago, told the jury that the indictment had been dismissed on

motion of the government. Defendants do not show that any other significant information was contained in the excluded documentary evidence.

Gordon, *Monroe*, and *Mack* are further distinguishable because in those cases reversal was based on the cumulative prejudicial effect of two or more errors. This case lacks at least one of the errors found in each of those cases.

We approve of the foregoing cases and of the policy of affording the defense wide latitude in showing bias. We do not view the disposition of the issues herein as inconsistent with them.

We have considered Battaglia's other points relating to cross-examination, exclusion of documentary exhibits and instructions and find them to be without merit. In closing this discussion, it should be noted that various criticized evidentiary rulings of the District Court were well within those approved in *United States* v. *Lawinski*, 195 F.2d 1 (7th Cir. 1952). Taken together, the evidentiary rulings here gave these defendants broader latitude than in *Lawinski* and do not amount to an abuse of discretion.

Evans' Character Witnesses

Evans was precluded from showing his good character through four acquaintances. Relying on *Michelson* v. *United States*, 335 U.S. 469, the District Court explained that his evidentiary rulings were based on improperly put questions and on improper foundation. As to some of the questions, this may have been an over-strict application of *Michelson*. However, no foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided. Proof of reputation "among a limited group such as fellow employees in a particular building" has been held inadmissible. 335 U.S. at

p 481, note 17; *Williams v United States*, 168 U S 382, 397; *Arcoo v United States*, 66 F 2d 449, 451 (7th Cir 1933) Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr Justice Jackson's precept not to "disturb rulings of trial courts" in this troublesome field except in rare instances (335 U S at p 480) (Emphasis added)

Restriction of Evans' Testimony

Evans argues that the District Court's evidentiary rulings during his testimony denied him an opportunity to present an adequate defense

It is true that Evans was not permitted to deny certain secrecy admonitions supposedly made about the Lansing project during Riley's June 1964 conversation with Evans, but this was because of the leading and suggestive nature of his trial counsel's questions To rebut secrecy, Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August 1964

The rulings not permitting Evans to answer certain questions as to conversations with Amabile, La Key, DiVito and Pranno were based on the improper form of the questions and lack of proper foundation These rulings are supportable under rudimentary rules of evidence Furthermore, Evans was permitted to deny that he met with those persons after his counsel rephrased his questions

As to the bid sheets, Evans was allowed to testify that there were a signed original and a signed copy of the sewer contract bid sheets, and that the signed original was left in Riley's office, the very points his trial counsel was attempting to elicit

Since Evans was charged with a January 1965 conspiracy, we cannot state that it was erroneous for the District Judge to consider irrelevant whether Riley held Evans in high esteem in August 1965.

Our study of Evans' testimony shows that he was given great scope in presenting his denials of any part in the conspiracy. The District Court's exclusionary ruling did not jeopardize his defense and were permissible interpretations of the law of evidence.

Evans' Counsel's Inability to Comment on Battaglia's and Amabile's Failure to Testify

Before the defendants presented their witnesses, the District Court instructed their counsel not to refer to the failure of any of the defendants to take the stand. This instruction was of course to protect the Fifth Amendment rights of the two silent defendants, Battaglia and Amabile. The defenses of the three accused were not mutually exclusive. Also, Evans' counsel's closing argument took advantage of Evans' having taken the stand. There was no "showing that real prejudice will result from the defendant's inability to comment" (*United States* v. *Kahn*, 381 F.2d 824, 840 (7th Cir. 1967), certiorari denied, 36 U.S. Law Week 3251), so that severance was not necessitated.

Trial Publicity

Even though defendants successfully objected to sequestering the jury, Battaglia now argues that prejudicial publicity violated his due process rights. In closing argument, his counsel recognized that the trial court repeatedly admonished the jury to ignore news coverage. There is no claim that any jurors read any of the "prejudicial" articles, thus differentiating the case from *Marshall* v.

United States, 360 U.S. 310. In *Janko* v. *United States*, 366 U.S. 716, the second conviction was reversed because the trial court had not inquired whether the jurors had read a St. Louis *Post Dispatch* article published during the trial and containing "inadmissible prejudicial information."[9] Here the jurors were twice asked whether they had seen articles about the case. None admitted having done so. *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962), and *United States* v. *Largo*, 346 F.2d 253, 256 (7th Cir. 1965), certiorari denied, 382 U.S. 904, do not hold that the District Court must always interrogate each juror singly. See *United States* v. *Jamison*, 339 F.2d 916, 919-920 (7th Cir. 1964).

Battaglia also complains of the presence of a permanent press table inside the bar.[10] The Supreme Court has recently emphatically disapproved of such an installation (*Sheppard* v. *Maxwell*, 384 U.S. 333), so that the District Judges should consider reserving the bar of the court for counsel in the future (384 U.S. at p. 355). However, we do not consider the placement of this press table to constitute reversible error, for this record reveals no "frequent confusion and disruption of the trial" or "constant commotion within the bar" (384 U.S. at p. 355). In our view, the intrusion of the news media into this trial was not so great as to obviate a showing of prejudice (cf. *Estes* v. *Texas*, 381 U.S. 532 and *Sheppard* v. *Maxwell*, 384 U.S. 333). Battaglia has failed to satisfy us that he was denied a free trial because of adverse publicity.

[9] See Solicitor General's Memorandum filed in the Supreme Court in the *Janko* case.

[10] Such tables have been installed in the various trial courtrooms in the Northern District of Illinois.

Eavesdropping

The Government's brief reprints an August 18, 1967, letter from the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to the United States Attorney in Chicago. The letter confirms the Department's pre-trial advice to the United States Attorney that there was no electronic monitoring in this case. Cf. *Hoffa* v. *United States*, 387 U.S. 231. Accordingly, it is now academic whether the District Court should have granted a hearing to determine whether electronic eavesdropping had taken place.

No prejudicial error having been shown, the two judgments are affirmed.

Nos. 16312 and 16313

SWYGERT, *Circuit Judge*, dissenting. This dissent is based on two independent grounds. First, I do not believe that the Government introduced evidence sufficient to convict Battaglia and Evans of the crime charged against them. Second, although my views on the sufficiency of the evidence would dictate a reversal without remand, a multitude of prejudicial errors occurred which in combination, if not singly, precluded the defendants from receiving a fair trial. Consequently, on the basis of these trial errors, the case should be remanded for a new trial regardless of the insufficiency of the evidence.

I.

SUFFICIENCY OF THE EVIDENCE.

Accepting the evidence in the light most favorable to the Government, the evidence unquestionably showed that Amabile, Pranno, DiVito, Evans, and LaKey devised and executed a scheme to defraud the Riley Management Cor-

peration by using the Carlson Construction Equipment Company as a facade so that money meant for construction purposes could be diverted to those participating in the scheme. But this scheme was not the one charged in the indictment. The evidence also unquestionably showed that Amabile threatened Kiley for the purpose of obtaining money. The record is barren, however, of any evidence, direct or circumstantial, to sustain the charge that Battaglia and Evans conspired with Amabile "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Kiley dwelling units by means of extortion.

In early 1961, the Kiley Management Corporation began planning the construction of an apartment building at Lansing, Illinois. In June of that year, William Kiley, president of the Kiley company, requested his construction superintendent, Dave Evans, to start lining up contractors for the Lansing project, but asked Evans to keep the project "secret from Joe Shine [Amabile] and Nick D'Alerme." A few days later Kiley, at Amabile's request, met Amabile and D'Alerme at the latter's Melrose Park plumbing company office. Kiley testified concerning this meeting:

> Nick D'Alerme asked me if I was going to build a project in Lansing, Illinois. I told Mr. D'Alerme that I was and Mr. D'Alerme asked me when he was going to get the blueprints so that he could figure the work. I told Mr. D'Alerme that I did not plan on giving him the work. I told Mr. D'Alerme that he was behind on his existing projects and with the efficiency that we are now enjoying, it was ridiculous to give him this project.
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> Joe Shine told me that I wasn't going to give it to anyone else other than them and they asked me basically what the hell I was trying to pull. . . .
>
> • • •

Joe Rhone told me that if I didn't give them the work in Lansing, that he would stop the project in Northlake and in Westmont, Illinois. They told me that I had to use them, that if I didn't use them, that they would put me out of business. I told Nick and Joe that they were now in the process of putting me out of business, the way they were doing it. I was told not to be a smart punk.

Joe Rhone told me I shouldn't be a wise guy. Joe Rhone told me he knew how to handle wise guys and that I would be walking the streets with a candy cane.

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Joe Rhone told me he knew where my mother lived. He would — he told me that he knew where my kids went to school and they had a baseball bat to handle wise guys like me.

After this meeting, Riley gave Palermo the plumbing contract for the Lansing project.

In late July or early August 1984, Amabile met Mike DiVito, a sewer contractor, and Ronnie Pranno in the latter's Fifth Nugget Club in Stone Park, Illinois. Upon learning from Amabile about the Riley project in Lansing, DiVito asked if he could obtain some of the sewer work. Amabile said "it was possible," but that he didn't want DiVito's name on the contract. A few days later Amabile told DiVito and Pranno that if they came up with "a good clean fellow," they could get the sewer contract for the Lansing project. Shortly after this conversation, DiVito and Pranno persuaded Henry LaKey (who had been a foreman on sewer construction jobs) to work for them if they succeeded in getting the Lansing contract.

In mid-September, DiVito, Pranno, Evans, and Amabile met in the latter's apartment in Northlake, Illinois. Pranno told Amabile that he and DiVito "had a fellow to do

the work for us called Hank LaKey and that he was clean." Amabile replied, "Okay, that's fine . . . [but] before I give you this job, I want $20,000 in cash."

During this period, DiVito and Pranno hired LaKey to work for them for $200 per week plus a ten per cent bonus upon completion of the job. They told LaKey they were starting a "new corporation" to be called the Carlson Construction & Equipment Corporation and they would like to have him put "on the paper as president" of the company. In contemplation of giving the sewer work to DiVito and Pranno, Evans apparently drafted a written contract to be signed by Carlson Construction. The contract that Evans originally drew up, however, was unsatisfactory to DiVito and Pranno because they had decided, after looking over the plans, that there would be insufficient proceeds from the job to pay Amabile the twenty thousand dollars he had demanded "off the top." At this point, Amabile told Evans to figure a way to get more money out of the job. Evans rewrote the contract raising the price approximately forty to forty-five thousand dollars. After looking at the plans and specifications and seeing the high price of the job pursuant to the rewritten contract, DiVito informed Pranno that "there would be $20,000 in cash above our costs and profits." Pranno then told Amabile in the presence of DiVito and Evans that he would give him the twenty thousand dollars. Amabile replied "Okay, it's a deal." In accordance with their previous discussion, Pranno, DiVito, and LaKey formed the Carlson Construction & Equipment Company. DiVito and Pranno each received forty-five per cent of the stock and LaKey the remaining ten per cent.

Sometime in September, Riley asked Evans whether he had lined up a sewer contractor. Evans said that he had obtained an excellent contractor, Carlson Construction,

operated by a man named LaKey. Evans told Riley that he "had looked into Carlson Construction's reputation, it was excellent, and . . . [he] felt quite confident that this man could do a good job." Carlson Construction was given the contract under an arrangement whereby Lawn Savings & Loan Association was to pay Carlson upon receipt of payment slips issued by the Riley Company. Carlson Construction commenced the sewer work in September or October, 1964.

Early in November, Amabile instructed LaKey to get the necessary papers ready for making the first "draw." After preparing the papers, LaKey went to see Amabile at the El Morocco, a night club operated by Amabile in Northlake, Illinois. LaKey testified: "Joe Shine [Amabile] asked me how much the draw was for. I told him $57,000. . . . Joe Shine said he would get a hold of Dave Evans and straighten this out." Within a day or two, LaKey and Amabile went to see Evans, who was a patient in Illinois Masonic Hospital. Before they saw Evans, Amabile told LaKey that Evans was going to receive $5,000 as his cut, not $7,500 as originally planned. At the meeting, Amabile gave Evans a "wad of bills." Evans then looked over the papers for the first draw and crossed out a number of items. After the papers had been retyped, reflecting a reduction of $10,000 in the draw, Evans approved the papers and told LaKey to take them to Riley's office. On November 12, LaKey received a check for $47,517.97 from Lawn Savings & Loan Association based on a pay-out slip approved by Sol Meltzer, Riley's comptroller. LaKey deposited $39,000 in the Carlson Construction payroll account. Of the remaining $8,517, LaKey retained $517 and gave Pranno $8,000. Three days later, at Amabile's direction, LaKey withdrew $20,000 in cash from the Carlson Construction account which he gave to Amabile.

In January 1966, Amabile told LaKey to prepare the papers for a second draw. LaKey got the papers ready and showed them to Amabile who asked how much the draw was for. LaKey replied, "$60,000." Amabile thought that this figure was too high, saying, "I don't want that kind of money taken out of the account at this time. I will tell you what to draw." He also said that he would straighten it out with Evans. That same day, Evans reduced the figure to $48,000 and, after approving the papers, told LaKey to present them to Meltzer for the payment slip. When LaKey presented the papers covering the second draw for approval, Meltzer refused to authorize the request.

LaKey immediately went to see Amabile, relating in Evans' presence what had happened. At Amabile's instruction, Evans and LaKey went to see Riley the next day. Pursuant to Evans' request, however, they entered the office separately. When LaKey told Riley that he was there to get the second draw, Riley replied that Carlson Construction's bills were not being paid, and that he would authorize a payment only when LaKey had satisfied these obligations. During the conversation, LaKey told Riley that the cost of the job had gone up from $120,000 to $200,000. When Riley asked Evans to explain why the price had been increased, Evans told Riley, "There's complications set in on the job and we had to raise the price up to get the job done."

LaKey reported to Amabile that Riley had refused to authorize the second draw. Amabile replied: "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." The next morning LaKey and Amabile arrived at Riley's office and walked in unannounced. Amabile asked Riley why he did not pay LaKey. Riley said he

couldn't authorize the draw until LaKey had paid his bills. Amabile then told Riley: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went to the back of the office and commenced a conversation during which LaKey "seen a lot of arms moving by Joe Shine," who was doing most of the talking. Then Amabile walked towards LaKey, gave him a wink, laughed, and said, "You'll get your money now." Before leaving, Amabile turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." On the way back to the El Morocco, LaKey asked Amabile how he was able to tell "a big man like Riley" what to do. Amabile put up his fist and said, "I got this son of a bitch right here, . . . He's afraid of me."

On the witness stand, Riley gave this version of the meeting:

> Mr. Shine told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
>
> I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him.
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> • • •
>
> Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.
>
> I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build

up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him.

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He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs.

Riley further testified that he subsequently authorized the payment because he was afraid; that he had been subjected to previous threats of physical harm to his family and his employees and ruination of his company by Amabile and Nick Palermo. Shortly after this meeting, LaKey deposited a $48,512.48 check, received from Meltzer, in the Carlson Construction bank account. Later Amabile told LaKey to withdraw $17,000 from the account. Of this amount, Amabile gave LaKey $5,000; LaKey in turn gave Evans $1,000.

A close analysis of the evidence in this case is essential to determine whether the Government proved the crime charged. The precise charge was a conspiracy to extort money from Riley. The gist of the crime of conspiracy is an agreement between two or more people, rather than the resultant action undertaken pursuant to the agreement. Since the agreement is the gist of the crime, the agreement itself must be proved either by direct or circumstantial evidence. If circumstantial, the circumstances must be such as to warrant the jury in finding that the alleged conspirators had "some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement. . . . " *Shannabarger* v. *United States*, 99 F.2d 957, 961 (8th Cir. 1938).

The conspiracy charged in this case was allegedly aimed at obstructing and delaying the interstate movement of

materials and supplies required for Riley's Lansing project. That obstruction and delay was to result from the extortion of $48,500 from the Riley Management Corporation by engendering fear of bodily and economic injury in William Riley.

There is a substantial question concerning the admissibility of many statements testified to by DiVito, LaKey, and Riley, which were neither relevant to the crime charged nor binding on absent alleged coconspirators. Assuming for the sake of argument, however, that all their testimony was relevant and admissible, I still do not believe that the evidence shows either that Evans agreed with Amabile and Pranno or that Battaglia agreed with Amabile and Pranno to commit the extortion charged in the indictment.[2]

The evidence with regard to Evans shows that the only agreement or "common design and undertaking" to which he was party was one to bilk the Riley company by means of fraud and deceit out of money earmarked for the Lansing job. Consistent with a scheme to defraud, DiVito and Pranno kept in the background, Amabile expressly ordering DiVito to stay off the job. A "good, clean fellow," LaKey, was recruited to act through the facade of Carlson Construction. There was constant effort among the conspirators to make sure that Riley was kept in the dark about Amabile's connection with Carlson Construction. Both draws were misrepresented to Riley as being legitimate expenditures. All these facts, as well as many others in the record, are indicia of fraud rather than extortion. Fraud is marked by misrepresentation, deception, and deceit. Extortion is direct and brutal — the very antithesis of fraud.

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[2] There was no proof that Evans and Battaglia had any connection with each other except through common acquaintance with Amabile, DiVito, Pranno, and LaKey.

The Government argues that the most conclusive direct evidence showing Evans to be a "willing participant" in the conspiracy is a statement made by him to LaKey when LaKey expressed anxiety about paying his bills. Evans said: "I will talk to Joe Shine and Joe Shine will talk to the man. . . . We will see that the money is in the bank for you." (This statement was made in January 1965, after the first draw and after Amabile had gotten his $20,000 "off the top.") Subsequent to Evans' statement, arrangements were undertaken for the second draw. Again attempts were made to deceive Riley. Evans decreased the amount of the draw prepared by LaKey. When LaKey failed to get the draw approved, Evans accompanied LaKey to Riley's office, but by prearrangement they entered the office separately. Evans told Riley on this occasion "there's complications set in on the job and we had to raise the price up to get the job done."

The foregoing facts, all involving conduct by Evans occurring after his statement relied on so heavily by the Government, suggest only deceptive conduct on his part, rather than complicity in a scheme to extort. Moreover, these same facts highlight the individual action of Amabile in resorting to extortion. When Amabile realized that the subterfuge was no longer working as it had in the past, he decided to take things in his own hands, and, unknown to the others, unmask the fraud and threaten Riley in order to get an approval of the second draw.[3]

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[3] This use of the phrase "the man," like some of its other uses, (*See infra* notes 5-7 and accompanying text) fails to identify the person being referred to. The majority recognizes that in this instance the phrase could refer to either Battaglia or Riley. Yet they conclude by implication that Evans was referring to Riley, stating, "The jury could properly infer that Evans knew Amabile

The Government also argues that the creation of Carlson Construction merely "put a velvet glove on the iron fist with which Amabile and 'The Man' had terrorized Riley in the past." Although past extortion of Riley had been used to obtain contracts, the Government contends that in the present situation, Amabile, with Evans' cooperation, did not have to resort to force to obtain the sewer contract; instead Amabile could wait and exert his pressure to obtain the money obligated by the contract.

In fact, however, this argument reveals the clear import of the evidence in this case — that a fraudulent scheme was practiced on Riley. When Riley flatly refused to approve the second draw even though Evans had tried to persuade him in the other direction by making a bald misrepresentation, Amabile unilaterally, and perhaps spontaneously, reverted to his more accustomed role, that of an extortionist. This unilateral action on the part of Amabile cannot be transformed into a prior agreement with Evans and Battaglia to extort as the Government charged in the indictment.[4]

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would induce Riley—through fear—to authorize the second draw." If he was instead referring to Battaglia, the most damaging aspect of the Government's case against Evans is neutralized. Because the phrase "the man" is so indefinite and ambiguous, only speculation and surmise could supply the purport of a reference to Battaglia. But the same speculation and surmise is necessary to support the majority's rationale that the statement reflected Evans' awareness that Amabile was going to exercise extortion on Riley.

[4] The record indicates that prior to the second draw Evans told LaKey that the only contracts Evans would "let out here [Lansing] are the ones Joe Shine tells me." Evans' deep involvement with Amabile is further indicated by a statement Evans made to LaKey after the second draw when he said: "I can't get out. I am too

The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia. The evidence touching upon Battaglia's connection with the crime charged may be summarized as follows. Riley testified that although he had never met Battaglia, he had seen him once in early 1964 in Amabile's night club. DiVito testified that he saw Battaglia talk to Amabile in October of that year in Amabile's club. LaKey testified that in late November or early December, he was with Amabile at Battaglia's farm in Pingree Grove, Illinois, where he was introduced as "Hank LaKey running the job for them in Lansing, Illinois." While there, he heard Battaglia ask Amabile why Evans was "getting that kind of money." Amabile replied: "I made a deal with the man. The man got us the job. . . . I promised him $7,500,

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deep with Joe Shine. I know too much about the other people." The day before this conversation, LaKey had been called back from Florida to a meeting attended by Amabile and Evans. LaKey described what took place:

> I got in a conversation with Joe Shine first as soon as I got in the Club, he hollered and told me, he said, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble."

In sum, although this testimony confirms Evans' association with Amabile, it just as strongly suggests that their association was in furtherance of a scheme to defraud. At the time of the meeting testified to by LaKey, Evans was unaware that Amabile had committed extortion upon Riley to obtain the second draw. The only inference that can properly be drawn from LaKey's testimony, therefore, was that Amabile was attempting to keep the ruse going by conveying the impression to Evans that the scheme to defraud was still in operation.

I'll take care of it." DiVito testified that in February or March 1965, he went with Pranno to Battaglia's farm. Amabile came a few minutes later and the three of them awaited Battaglia's arrival. According to DiVito, Pranno said in Amabile's and Battaglia's presence, "You know about this Riley deal in Lansing where we got Hank LaKey to set up the company and do the work for us and figure $20,000 in for you?" Battaglia nodded. Pranno and Amabile then argued whether Amabile had taken LaKey away from Pranno. Battaglia interceded by saying: "Cut it out, you fellows. Keep it down." DiVito further testified:

> Then Jim Pranno continued to talk and he says, "You know we had to borrow $5,000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Mr. Battaglia nodded, says "Yes." And then Jim Pranno continued and says, "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan," and Jim Pranno continued on to say that Hank LaKey was a no good s.o.b. Then Mr. Battaglia says, "Well, I don't think Hank LaKey is such a bad guy, I like him, I like to work with him," that they had other things coming up, and that they could use him again because he was clean. And after a minute or so, a pause of about a minute, then Mr. Battaglia got up out of his chair and said; "Rocky, I'll see what I can do for you."

On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile. Nor is there any evidence that Riley feared Battaglia or that Battaglia received any of the money extorted from Riley. Finally, there is no evidence that Battaglia agreed with Amabile, Pranno, or

Evans to commit the crime charged against them. Yet the Government argues in its brief:

> Just as Evans acted at Amabile's direction, Amabile worked at the direction of the defendant Battaglia. Amabile was the muscle while Battaglia was the brains, setting policy and settling disputes. His veil of secrecy was his supposed anonymity, known to a few as "The Man." When one wanted to see "The Man," one went to "The Farm."
>
> From the foregoing evidence a jury could infer that Battaglia had a real interest in the outcome of the Lansing project, that he was participating financially in Carlson Construction's contract and that all other co-conspirators acted at his direction, directly as with Amabile, or indirectly, as with Evans.
>
> From his own mouth Battaglia admitted knowledge of Evans' role and that Evans was being paid. Battaglia knew of La Key's role and that Carlson Construction had the contract on the Lansing project. He knew that La Key was being used as a front, because "he was clean." With Battaglia's knowledge of the foregoing, the jury could conclude that he was a participant in the conspiracy to place Riley in such a position that when Riley learned that Carlson Construction was in fact Amabile and Battaglia, he would authorize payment of the money in the escrow account, not because of the contract, but because he feared Amabile and "The Man."

These inferences which the Government seeks to draw, some of them non sequiturs, can rise no higher than speculation and surmise.

Much of the Government's case against Battaglia rests on identifying him as "The Man." But of the numerous instances of the use of that phrase in the record, many

refer not to Battaglia, but rather to LaKey,[5] Evans,[6] and Amabile.[7] Battaglia's financial stake in the alleged conspiracy to extort is demonstrated, according to the Government, by his two nods and saying "Yes" at the mention of "$20,000 in for you." Although Battaglia's responses to the mention of the money indicate that he was not a stranger to the Lansing venture, they are in no way probative of his complicity in a conspiracy to extort. The force of the Government's argument in this regard is largely diminished by the fact that "the Brains" [Battaglia], who was supposedly "setting policy," had to be reminded twice by Pranno that he had money coming to him.

Reliance is placed by the majority on two Second Circuit cases, *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944), and *United States* v. *Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). *Andolschek* is cited in support of the proposition that "Battaglia had 'embarked on a criminal venture of indefinite outline'" and therefore, "had to 'take his chances' as to the methods used by the other co-conspirators." The full text of the passage, however, is more illuminating:

> It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite

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[5] When Amabile went to see Riley concerning the second draw, Amabile said, "*The man's* got his money coming, Bill, I want you to pay his money." (Emphasis added.)

[6] When LaKey and Amabile were going to visit Evans in the hospital, LaKey said, "Joe, the deal was for $7,500 for *the man*." (Emphasis added.)

[7] When Riley first met Amabile and Palermo in April 1962, Riley testified, "Mr. Shine who I had just met struck his face in my face and told me he was *the man* in Northlake." (Emphasis added.)

> outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. *Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them. United States* v. *Andolschek, supra* at 507. (Emphasis added.)

And despite the majority's assertion that the "stringent test of conspiracy liability" set forth in *Falcone* was met by the Government here, that case condemned guilt by mere association.

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *United States* v. *Falcone, supra* at 581.

There can be no doubt that Amabile and Battaglia associated together, but, as the court stated in *Falcone*, mere association is insufficient evidence of guilt to support a conviction.

II.

Trial Errors

In urging reversal, Battaglia and Evans point to a number of trial errors which they claim not only unduly

prejudiced them, but also prevented them from receiving a fair trial. Contrary to the majority's disposition of these contentions, I believe that such errors did occur.

Because of my views on the sufficiency of the evidence, however, I do not believe that an extended discussion of the trial errors is either necessary or appropriate. I only refer to them as they reflect upon the conduct of this trial as a whole, the most striking aspect of which was the unfavorable climate in which the proceedings were conducted. Perhaps no single error occurring outside that climate would be sufficient to require a reversal; however, their cumulative effect, as exemplified by the three errors that will be discussed in detail, leads inevitably to the conclusion that the defendants were denied a fair trial.

A. *Pre-conspiracy Threats*

The indictment charged that a conspiracy among the defendants to violate the Hobbs Act began "in or about July, 1964." Yet, William Riley, the victim of the alleged extortion, was permitted to testify over objection about threats made to him in 1962 and 1963 by defendant Amabile and Nick Palermo. These threats related to Riley's proposed building project in Northlake, Illinois and the subsequent payment of $30,000 to Amabile. Riley also testified about threats made by Amabile and Palermo in 1963 in regard to plumbing work at a Riley building project in Westmont, Illinois. Palermo on that occasion said he "would bury Hubley," Riley's construction superintendent, and Amabile said he "would hammer the nails on the coffin." Amabile made other threats to Riley at that time. Purportedly, this testimony was admitted for the purpose of showing the basis of Riley's fear of Amabile in January, 1965. There was ample testimony by Riley, however, of threats made by Amabile after the commencement date of the alleged conspiracy.

According to the majority, the testimony of these threats was "relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that his testimony was limited to that purpose." Although I agree that proof of the reasonableness of an extortion victim's fear by testimony of prior threats is generally permissible, the testimony of threats made by Palermo, who was not even charged as an unindicted coconspirator, was irrelevant for any purpose. Moreover, I am at a loss to find the "careful instruction" referred to by the majority. Because the testimony of threats by Palermo was both irrelevant and inflammatory, the defendants were prejudiced by the district court's failure to instruct the jury to disregard that testimony. *Cf. United States v. Critchley*, 353 F.2d 358 (3rd Cir. 1965).

B. *The Accomplice Instruction*

The accomplice instruction was improper because the district judge, in his definition of an accomplice, for all practical purposes told the jury that the crime charged had in fact been committed. In so doing, he invaded the province of the jury. This kind of an instruction would be proper in a prosecution where the alleged accomplice admitted his participation in a conceded criminal offense. In that situation, an instruction like the one given here correctly delineates the weight to be accorded the testimony of the accomplice as that testimony tends to implicate others in the crime that has been committed. In the instant case, however, the crucial question was not who the participants of a conceded crime were, but whether a conspiracy to violate the Hobbs Act, the crime charged, had been formed by the alleged conspirators.

Because the instruction did not explicitly leave open the question whether any of the witnesses were accomplices, the jury may reasonably have interpreted the instruction as a direction from the judge that the crime charged had been proved. To avoid this substantial risk of prejudice, the instruction should have been framed so that the jurors were unequivocally informed that they were the sole judges of whether any witness was in fact an accomplice. Such modification would have cured the instruction's vice — the implied assumption that the alleged conspiracy was a proven fact. See *Gordon* v. *United States*, 353 F.2d 9 (5th Cir. 1965).

C. *Evans' Character Witnesses*

Evans sought to elicit testimony of his good character through four witnesses. Conceding the somewhat inept manner in which this undertaking was attempted by Evans' counsel, the district judge's treatment of these efforts was nevertheless unduly restrictive. Throughout the course of defense counsel's efforts to question the character witnesses, Government counsel interposed objections to all questions directed to an assessment of Evans' general reputation as an honest, truthful, and law-abiding citizen. On almost every occasion, these objections were indiscriminately advanced by the simple statement, "I object." With equal regularity, the judge sustained the objections, only rarely intimating the reasons for this action.

At one point, Evans' counsel, obviously frustrated and bewildered, asked the judge to elaborate on his prior statement that "the question is improperly put." In response, the judge should have either demanded that Government counsel frame his objections in more concrete and specific terms or sustained the objections in a man-

ner to convey to defense counsel the reason for his rulings. His failure to do so worked an unnecessary and prejudicial hardship on Evans' counsel's efforts to elicit character testimony from his witnesses.

In addition, some of the court's rulings sustaining the Government's objections were erroneous. On more than one occasion, a foundation was laid to qualify the witness, and the question posed to the witness was properly phrased. The apparent basis for the rulings sustaining the Government's objections to these particular questions was that the testimony sought related to Evans' reputation in the business community rather than his reputation in the community where he lived. The majority relied on this distinction, stating, "[N]o foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided."

Reputation in the business community, however, is no less probative than reputation in the residential community to show the absence or pressure of certain character traits in an accused. In this regard, Professor McCormick's observation is apposite:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 158, at 335 (1954).

See also Whiting v. *United States*, 296 F.2d 512, 517 (1st Cir. 1961). Because the crime charged against Evans had a business setting, the most probative character evidence was kept from the jury by the court's rulings. These rulings were erroneous. They were also prejudicial.

For as the Supreme Court said in *Michelson* v. *United States*, 335 U.S. 469, 476 (1948), "This privilege [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone, . . . may be enough to raise a reasonable doubt of guilt. . . ."

III

Instead of the traditional presumption of innocence with which criminal defendants are ordinarily clothed, the record in this case suggests that a presumption of criminality attached to the acts of these defendants because of their infamous reputations and notoriety. The defendants may have been guilty of nefarious conduct for which they deserve imprisonment, or they may have had such bad reputations as to be considered menaces to society. Such facts alone, however, cannot warrant a blinding of eyes, permitting a conviction to stand that is based on surmise rather than evidence. This kind of difficulty is present in this case because the charge on which the defendants were convicted and imprisoned, an agreement to extort money, was not sustained by the evidence. No person should be punished under our criminal laws unless he has been proved guilty of a specific offense by competent evidence in a fair trial. Due process of law demands nothing less.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

Nos. 16312 and 16313

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SALVATORE BATTAGLIA and DAVE EVANS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 10, 1968

ON MOTION TO REMAND

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Since our opinion was announced, defendants have filed a motion to remand to the District Court to determine the effect of any eavesdropping on this trial in accordance with the procedure prescribed in *Kolod* v. *United States,* 36 U.S. Law Week 3306. In response, the Government has transmitted the transcripts of certain overheard conversations involving defendant Battaglia. This Court had not previously been advised that any electronic monitoring had occurred. A careful *in camera* examination of the transmitted material reveals that these conversations were utterly irrelevant to these convictions. We are frequently called upon to determine relevancy as a matter of law. This case is still pending here on a petition for rehearing *en banc* and

the documents are also before us. These factors, coupled with the utter irrelevancy of the documents make it appropriate to dispose of the matter here. Review here also avoids additional delays to defendants. In our view, *Kolod* does not require further District Court action in the circumstances of this case. If there were any doubt as to the tainting of these convictions by the use of these documents, we would afford relief to defendants. There being no such doubt, there is no need to vacate our judgment and remand for a District Court documentary review. Defendants' motion is denied.

Nos. 16312 and 16313.

SWYGERT, *Circuit Judge*, dissenting.

In view of the Supreme Court's per curiam opinion in *Kolod* v. *United States*, 36 U.S.L.W. 3306 (January 30, 1968), I believe that we are required to remand this case to the district court to determine the effect of any eavesdropping. In *Kolod* the Supreme Court said:

> Accordingly we . . . remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of any conversations that may be shown to have been overheard through unlawful electronic surveillance. . . . If the District Court decides, on the basis of such findings, that the conviction of the petitioners was not tainted . . . it will enter new final judgments of convictions based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. 36 U.S.L.W. at 3307.

In the Government's pending motion to modify the order of the Court, the Solicitor General seeks the following modification:

> We submit, however, that there are sound practical reasons why it would be better practice to require the government to submit the logs preliminarily for an *in-camera* inspection by the district judge. This would not of course preclude the district judge from conducting further proceedings in instances where he found that a legitimate purpose might be served thereby.

Both of these extracts recognize that it is the function of the district court, not the court of appeals, to conduct an inquiry into the effect of electronic eavesdropping on a defendant's conviction. As *Kolod* now reads, this court's decision in the instant case is in direct conflict with the procedure outlined in that opinion. And even if the Government's motion to modify is granted, a remand to the district court would remain the only proper disposition.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1967 January Session, 1968

No. 16314

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH AMABILE, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 26, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This appeal is to review Joseph Amabile's conviction for conspiring with Salvatore Battaglia, Dave Evans and non-defendant Rocco Pranno to violate the Hobbs Act (18 U.S.C. § 1951). The gravamen of the charge was that in January 1965, the conspirators obtained $48,500 from the Riley Management Corporation through threats of bodily harm to its president and economic harm to both. Battaglia's and Evans' convictions were affirmed in ..... F.2d ..... (7th Cir. 1968).

Amabile first argues that the Government failed to prove that he conspired to obtain money from Riley Management Corporation by extortion. A like argument was advanced by Battaglia and Evans and rejected in their appeals. For the reasons stated in the prior opinion, the evidence was sufficient to support Amabile's conspiracy conviction. See F.2d at pp.

Amabile's next point is that his "extortionate threat made against a man [William Riley, president of the Riley Management Corporation] whose business touches interstate commerce" does not violate the Hobbs Act because the threat was only indirectly and remotely connected with interstate commerce. We disposed of this issue in the opinion dealing with Amabile's co-defendants. See F.2d at p. . However, since Amabile presses the issue to considerable extent, further discussion may be warranted.

The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215. As to the commerce power, the Supreme Court has recently stated in *Katzenbach* v. *McClung*, 379 U.S. 294, 305:

> "The power of Congress in this [commerce] field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."

Since Congress has used all its "broad and sweeping" commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute. Thus

in language applicable here, Judge Sanborn stated as follows in *Hulahan* v. *United States*, 214 F.2d 441, 445 (8th Cir. 1954), certiorari denied, 348 U.S. 856:[1]

> "It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion or attempted extortion which in any way or *in any degree* reasonably could be regarded as affecting such commerce. The exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce, is, in our opinion, proscribed by [the Hobbs Act]." (Emphasis supplied)[2]

As in *Hulahan*, Amabile was exacting tribute from a builder "dependent upon interstate commerce for materials, equipment and supplies" and was therefore within the reach of the Hobbs Act. It is unnecessary that the extortion have as substantial an effect on interstate commerce as a combination in restraint of trade. *United States* v. *Malinsky*, 19 F.R.D. 426, 428 (S.D. N.Y. 1956).

As pointed out in our prior opinion, the $48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves. Depletion is pertinent in considering commerce under the Hobbs Act. Thus

[1] Recent instances where this Court has affirmed Hobbs Act convictions in cases involving construction projects are *United States* v. *Kramer*, 355 F.2d 891, (7th Cir. 1966), certiorari denied (except on an irrelevant point) 384 U.S. 100, and *United States* v. *Sopher*, 362 F.2d 523 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

[2] The *Hulahan* case has been followed by this Court at least twice: *United States* v. *Floyd*, 228 F.2d 913, 916, 918-919 (7th Cir. 1956), certiorari denied, 351 U.S. 938; *United States* v. *Green*, 246 F.2d 155, 160 (7th Cir. 1957), certiorari denied, 355 U.S. 871.

in *United States* v. *Provenzano*, 334 F.2d 678, 692 (3d Cir. 1964), certiorari denied, 379 U.S. 947, a Hobbs Act commerce instruction was approved which stated in part:

> "Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired."

The Hobbs Act does not require that the threats to Riley and his family be directly aimed at interstate commerce. In the statute Congress defined extortion as obtaining property through "actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2)). There is no requirement that the extortion be directed at interstate commerce as long as the extortion "in any way or degree obstructs, delays, or affects commerce" (18 U.S.C. § 1951 (a)). To accept appellant's construction would mean that Congress had exempted the most efficacious of threats. Certainly Congress did not intend such an anomalous result.

Like his co-defendants, Amabile asserts that the District Court unduly restricted cross-examination. He first asserts that he was not permitted to undermine Riley's testimony that the Lansing, Illinois, building project was meant to be kept a secret from Amabile and Palermo. As we pointed out in our earlier opinion, "Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August, 1964." ..... F.2d ..... In addition Battaglia's counsel was permitted to cross-examine Riley, without objection, about advertising for the Lan-

sing project, selling units therein before construction, and taking salesmen to Las Vegas to promote this project. It is clear that Amabile was given sufficient latitude to rebut the secrecy of the Lansing project.

Amabile also complains of the District Court's refusal to let his counsel ask Riley about the contents of five statements he had given to the Federal Bureau of Investigation, made available to defense counsel under the Jencks Act (18 U.S.C. § 3500). Riley had already testified that he advised the FBI of the 1962-1963 threats of Palermo and Amabile and that he had not read the statements. He of course had no way of knowing whether his complaints of the physical threats of Amabile and Palermo had been transcribed by the FBI in those statements. Amabile's counsel made no attempt to introduce the statements, so that they are not in the record. If the FBI statements were actually devoid of any reference to the Amabile-Palermo threats, Amabile's counsel should have called the recording FBI agents in order to lay a proper foundation for the admission of the five statements to impeach Riley. As Judge Friendly ruled in *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960:

> "when the witness is confronted with what appears to be an inconsistency, he may deny having made the contradictory statement to the agent and counsel's only recourse would be to call the agent and endeavor to have him prove the contrary."

See also 3 Wigmore on Evidence (3d ed.) § 1025.

Amabile repeats another argument offered by his co-defendants in their appeals, namely, that he was not permitted to show that Riley expected consideration in a state court theft indictment and in a federal tax investigation in return for his testimony herein. We rejected this

argument in the prior appeal in the last paragraph of our discussion under "Restriction of Cross-examination and Refusal to Admit Defense Exhibits" (F.2d at p.). The elaboration of this subject in Amabile's brief calls for a more detailed discussion.

Of course, a defendant may normally show that a prosecution witness expects favorable treatment from the Government in return for his testimony. 3 Wigmore on Evidence (3d ed.) §967. It is also well settled that the credibility of a witness may not be impeached by showing that he has been arrested and indicted. *Michelson* v. *United States*, 335 U.S. 469, 482; *United States* v. *Bolden*, 355 F.2d 453, 457 (7th Cir. 1965), certiorari denied, 384 U.S. 1012; Wigmore, *op. cit.*, §980a. This principle applies *a fortiori* to a federal tax investigation that has not resulted in charges being brought against the witness. In the present case, the District Judge was faced with a collision of these two principles. He was entitled to balance the conflicting interests and therefore did not abuse his discretion in keeping Riley's theft indictment and federal tax investigation from the jury.

Viewed in isolation, Amabile's effort to explore Riley's motives for testifying in the Government's favor might be proper. But we must heed the counsel proffered in *Johnson* v. *United States*, 318 U.S. 189, 202 (concurring opinion):

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

Applying this counsel, Amabile's entire cross-examination of Riley has been scrutinized.

Riley was subjected to a lengthy cross-examination, and Amabile's attempts to go into the state court indictment and tax investigation occurred very early. Thereafter, on at least seven occasions, Riley was asked questions implying that he was an unsavory character and financially irresponsible.[4] Counsel for Amabile then again sought to return to the state court proceedings against Riley. The series of intervening questions was so obviously improper that there has been no attempt on appeal to justify them. Considering the impropriety of the entire inquiry,

[4] Seven such occasions are as follows:

"Q. Weren't you arrested while you were drunk for exposing yourself?"

* * *

"Q. Did you ever get into a fight with a young man at the El Morrocco Club because you were so drunk?"

* * *

"Q. As a matter of fact, isn't it true in order to get that loan you bribed one of the officers [of the savings and loan association]?

"A. No, sir.

"Q. And paid him $25,000?"

* * *

"Q. Did you know it was an offense against the laws of the United States to bribe an official of a loan association for the purpose of obtaining a loan?"

* * *

"Q. Weren't you sued by Margaret Gillespie for fraud?"

* * *

"Q. As a matter of fact, you were broke at that time."

* * *

"Q. * * * did you sign a check to a payee by the name of Bona for $23,000 which came back 'NSF'?"

it is patent that Amabile's references to the state indictment and federal tax investigation were designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity. Cf. *United States* v. *Pennix*, 313 F.2d 524, 528-530 (4th Cir. 1963).

The District Court's rulings are also supportable on the ground that appellant's "questions do not appear sufficiently likely to have developed evidence that would have significantly weakened the Government's case" by showing the witness' bias. *United States* v. *Jones*, 360 F.2d 92, 96 (2d Cir. 1966), certiorari denied, 385 U.S. 1012. The United States Attorney does not control investigations being conducted by the Internal Revenue Service. Such investigations are common and usually involve no threat of an indictment. As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration. On this record, the District Court could properly conclude that the questions were speculative, unrelated to the charges against the defendant and not of sufficient probative value to show bias. *District of Columbia* v. *Clawans*, 300 U.S. 617, 632;[4] *Lott* v. *United States*, 230 F.2d 915, 918 (5th Cir. 1956), certiorari denied, 351 U.S. 953; *Leary* v. *United States*, 383 F.2d 851, 868 (5th Cir. 1967); *United States* v. *Higgins*,

[4] In *Clawans*, the reversal of the District Court was affirmed, but the Court observed (300 U.S. at p. 632):

> "The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, *and of slight bearing on the bias and credibility of the witnesses*, are not reversible errors." (Emphasis supplied)

362 F.2d 462 (7th Cir. 1966), certiorari denied, 385 U.S. 945; *Abegta* v. *United States*, 368 F.2d 544 (10th Cir. 1966).[5]

Because the United States Attorney was not empowered to influence the course of the state theft case or the tax investigation, and because the questions, in the light of other improper questions as to Riley during his cross-examination, were part of a smear campaign, we cannot say that the District Court abused its discretion in its rulings concerning these two subjects.

Amabile claims that his counsel was given insufficient time to read a 6 page statement that witness Henry LaKey had given to the FBI.[6] This statement was delivered to defense counsel under the Jencks Act at 10 A.M. on April 21, 1967. He had sufficient opportunity to read it from then until 2 P.M., when the usual noon recess ended and the cross-examination of LaKey began. There has

[5] Amabile has cited no case holding that it is reversible error to refuse to allow a defendant to show that a prosecution witness is biased because he expects favorable treatment on a pending indictment in another jurisdiction or in a tax investigation. In *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), favorable treatment had actually been accorded to the witness, and in *Gordon* v. *United States*, 344 U.S. 414, the trial judge warned the witness awaiting sentence on a guilty plea that leniency depended upon cooperation with the government. *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965), and *Harris* v. *United States*, 371 F.2d 365 (9th Cir. 1967), are distinguishable because they involved direct financial benefits to the witness.

[6] This statement is part of the record on appeal and took us and Government counsel less than 11 minutes to read. The District Court was able to digest and rule on ten such statements by witness Riley during the April 27th luncheon recess.

been no showing that his cross-examination of LaKey would otherwise have been different if more time had been allowed for study of LaKey's statement. Co-defendants' counsel did not even raise the point on appeal. In the absence of a showing of prejudice, the District Court did not abuse its discretion by allowing only such time as is "reasonably required for the examination of such statement" (18 U.S.C. § 3500 (c)).

Battaglia contended on his appeal that the Government should have granted his request for production of Mike DiVito's grand jury testimony. We held that production was unnecessary. See ..... F.2d ..... In addition to DiVito's grand jury testimony, Amabile insists that he was entitled to the minutes of the grand jury testimony of witnesses Henry LaKey and William Riley.[7] Each request was made during the cross-examination of these witnesses. We find no error was committed by the District Court's failure to turn over these grand jury minutes.

Amabile relies principally on *Dennis* v. *United States*, 384 U.S. 855, but that case adheres to the earlier standard that a trial court need not allow the defense to examine

[7] Excerpts from Riley's grand jury testimony were appended to Battaglia's petition for rehearing of his appeal. They show that Amabile purportedly made the following threat to Riley in 1964 as to the tax investigation of Riley:

> "Don't tell them anything. You know what happens to guys who talk, don't you?"

Riley replied to Amabile and Palermo: "What is the matter with you guys? On one hand you tell me you will kill me if I don't pay you the money; on the other hand these guys [Internal Revenue agents] tell me they will put me in jail."

grand jury minutes in the absence of a showing of a particularized need. At the time that Amabile's counsel requested the grand jury testimony of each of these witnesses, unlike counsel for the defendants in *Dennis*, he did not show particularized need and cannot now supply that requirement by hindsight.

Here, as in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, defendants sought a wholesale disclosure of grand jury testimony as a matter of right, whereas in *Dennis* the defendants only sought a disclosure of particular testimony.

Moreover, in *Dennis*, there was a 7-year time lag between the grand jury and trial testimony. Thus as Judge Waterman pointed out in *United States* v. *Youngblood*, 379 F.2d 365, 367 (2d Cir. 1967), "there was reason to assay the latter [trial] testimony, some of which is 15 years after the event against the much fresher testimony before the grand jury" concerning occurrences between 1948 and 1955. Here there was no such significant interval between the 1966 grand jury testimony of these witnesses and their 1967 trial testimony.

When Amabile's counsel asked to inspect the grand jury testimony, the Assistant United States Attorney offered to give a copy to the Court for an *in camera* inspection.[8] This offer was not accepted by defense counsel. If it had been accepted, the statements might have been turned over to them, so that any error in this connection was of defendant's own making.

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[8] The Supreme Court has not disapproved of *in camera* inspection by a trial court in order to enable it to rule on a defense motion for production of grand jury testimony. *Dennis* v. *United States*, 384 U.S. 855, 874.

For all these reasons, there was no abuse of discretion in denying production of the grand jury transcripts.

In *United States* v. *Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967), the Court of Appeals for the Second Circuit promulgated a prospective rule giving the defense access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied. At the oral argument of this appeal, the Government stated that it had no objection to such a prospective rule in this Circuit. We approve of the *Youngblood* procedure and adopt it with respect to trials commencing after this judgment is entered.

Amabile's final point is that the District Court erred in failing to order a pre trial preliminary examination before a commissioner pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure.[*] However, by its terms, Rule 5 was meant to afford an arrested person an opportunity to challenge the existence of "probable cause to believe that an offense has been committed and that the defendant has committed it." As the Supreme Court has stated, a preliminary hearing under Rule 5 is not required where, as here, an indictment has already been returned (*Jaben* v. *United States*, 381 U.S. 214, 220), for the grand jury already has found probable cause for holding the defendant for trial. *Bayless* v. *United States*, 381 F.2d 67, 71 (9th Cir. 1967); *Sciortino* v. *Zampano*, 385 F.2d 132, 133 (2d

[*] Rule 5(c) provides in pertinent part:

"* * * If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. * * *"

Cir. 1967), certiorari denied, 390 U.S. 906.[10] Neither the language of Rule 5 nor its history supports Amabile's assertion that its purpose was to afford pre-trial discovery.

The judgment of the District Court is affirmed.

No. 16314.

SWYGERT, *Circuit Judge*, dissenting.

I am constrained to dissent on several grounds. First, I adhere to the views expressed in my dissent in *United States* v. *Battaglia, et al.*, No. 16312 and No. 16313 (7th Cir. Jan. 9, 1968) that there was insufficient evidence of a conspiracy engaged in by Amabile with Battaglia and Evans "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units in Lansing, Illinois by means of extortion.

Second, regardless of the question of the sufficiency of the evidence to show a conspiracy to extort money, there was no proof of a violation of the Hobbs Act, 18 U.S.C. § 1951. Although this issue was presented obliquely in the Battaglia appeal, Amabile has advanced arguments which bring the question into sharper focus.

The evidence showed that during the construction of the Lansing project, Riley obtained building materials from suppliers located outside the State of Illinois. There was no evidence, however, that there was any delay in the ship-

[10] In *Sciortino*, Judge Hays showed that the contrary rule in *Ross* v. *Sirica*, 380 F.2d 557 (D.C. Cir. 1967), was not supported by a majority of that Court, nor has it been adopted in any other Circuit. See 385 F.2d at p. 134.

ment or delivery of these materials. Moreover, there was no evidence that any extortion threat directed against Riley carried with it, express or implied, a threat that the work on the Lansing project would be stopped or hindered.

In *United States* v. *Pranno*, 385 F.2d 387, 389 (7th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3346 (Mar. 5, 1968), we said:

> The Supreme Court has made it clear that the statute is to be construed broadly and is not limited to conduct which directly and immediately obstructs a particular movement of goods in interstate commerce. Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act. The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, *the carrying out of which would obstruct commerce.* (Emphasis added.)

I interpret this statement to mean that a threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat. This essential nexus is missing in the instant case.

The majority, quoting from *Hulahan* v. *United States*, 214 F.2d 441 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954), says that "Amabile was exacting tribute from a builder 'dependent upon interstate commerce for materials, equipment and supplies' and was therefore within the reach of the Hobbs Act." The facts in that case, however, were entirely different from those presented here. There the

defendant, a labor union representative, conspired to extort money from local construction companies by threats of labor unrest. These companies were dependent for the continuation of work undertaken by them upon local labor represented by the defendant and upon supplies and materials shipped interstate. Thus the extortion threats, if not complied with, would in all probability have brought a cessation of work on the project, thereby interrupting the interstate shipments of construction materials. In the instant case, however, there was no such probability that Amabile's threats to Riley, if not complied with, would have resulted in the interruption of the shipment of construction supplies and materials for the Lansing project. (In fact, it was to Amabile's advantage that the Lansing project proceed without interruption; for only then would Riley have authorized Carlson Construction Company to request "draws" for funds upon the Lawn Savings & Loan Association).

The majority also makes reference to the fact that the "$48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves." If a depletion of reserves is all that is necessary to show the requisite effect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the statute's proscription. Under this rationale, a retail store owner, for example, would be afforded federal protection from extortion, regardless of the nature or the likely effect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce. I do not believe that the Hobbs Act was in-

tended to have such a broad reach. In that connection, Judge Hastie's statement in his dissent in *United States* v. *Stirone*, 262 F.2d 371, 378, 379 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960), is pertinent:

> [I]t should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering a tenuous or speculative theory of federal jurisdiction.[1]

Third, an error which alone would require reversal (presented rather cursorily in the Battaglia and Evans appeals) relates to the district judge's restriction of Amabile's cross-examination of William J. Riley. Counsel for Amabile attempted to bring before the jury the facts that Riley was under indictment for theft in the state court, that he was under investigation by the Internal Revenue Service for tax evasion, and that his testimony was given in the hope of securing favorable treatment

[1] The majority quotes from *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), to support the proposition that, "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." I respectfully submit that the abstract language quoted from *McClung* has no application to the instant case. A decision upholding the constitutionality of the Civil Rights Act of 1964 under the commerce power can hardly have pertinency to the intended scope of the Hobbs Act.

from local and federal law enforcement officers concerning his allegedly illegal conduct. The district judge refused to permit cross-examination on these subjects.[2]

[2] The relevant portion of the transcript reads:

[Mr. Bellows, Amabile's counsel]

Are you the same William G. Riley who was indicted by the Criminal Court of Cook County for thievery in 1960 in the month of February

Mr. Lauzendella: [Assistant United States Attorney] I will object to that, your Honor.

The Court: I will sustain the objection. Mr. Bellows, you know better than that.

Mr. Bellows: I will connect it up, your Honor.

The Court: Mr. Bellows, you know better than that and I direct the jury to disregard that question.

By Mr. Bellows:

Q. Are you under indictment in the Criminal Court Cook County?

Mr. Lauzendella: I will object to that.

The Court: I sustain the objection and I direct counsel, Mr. Bellows, to refrain from asking that kind of question. I direct the jury to disregard that question.

Mr. Bellows: May I have a side-bar conference, your Honor, with reference to this?

The Court: No, no side-bar conference after those questions, sir.

Mr. Bellows: May I be permitted to make an offer of proof outside the presence of the jury?

The Court: In respect to that last question, you may.

• • •

Mr. Bellows: Your Honor, my offer of proof is as follows: I expect to show by cross examination and it may be verified, if you choose to do so, if he denies the fact, that he was indicted in the month of February, 1960, for the crime of theft which is a felony; that the matter has been pending now over a year and that the reason for the extraordinary delay in bringing this matter to justice for a crime of theft—actually it was forgery, but under our new statute, your Honor, it is con-

The majority concedes that when "viewed in isolation" defense counsel's "effort to explore Riley's motives for testifying in the Government's favor might be proper." The majority goes on to say, however, that a defendant's right to show that a prosecution witness expects favorable treatment from the Government in return for his testimony

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subject to be theft—is that he expects to get consideration, your Honor, from the court and the prosecution in Cook County for his cooperation with the government in this case and for his testimony in this case.

For that reason, your Honor, I think it is extremely important to show motive and reason for his testimony in this case.

The Court: What is the government's position in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: May we have just a moment.

The Court: Yes.

Mr. Lamendella: If this offer is being made, your Honor, to impeach the witness on the basis of an indictment, we object.

The Court: Do you object to the offer?

Mr. Lamendella: Yes, we do.

The Court: I sustain the objection.

Bring in the jury.

Mr. Bellows: May I add one more point, your Honor?

The Court: I have ruled on your offer. You can't add to an offer once it is made, sir.

Mr. Bellows: I want to explain the position of Lamendella to be inconsistent with my offer. He says he objects to the indictment. This is beyond the indictment.

The Court: He said he objected to the offer.

Mr. Bellows: Well, he said to the indictment.

The Court: You object to the offer of proof?

Mr. Lamendella: I do, your Honor.

• • •

The Court: You may continue, Mr. Bellows, with the cross examination of this witness.

By Mr. Bellows:

Q. Mr. Riley, are you presently under investigation by the

must be balanced against the rule that the credibility of a witness may not be impeached by showing that he has been indicted or is under investigation, and that the balancing of these conflicting rules entitled the district judge to use his discretion in deciding whether to permit cross-examination on Roby's expectation of favorable treatment.

I do not believe that a conflict between these evidentiary rules, such as the one the majority attempts to erect, exists. The right of a defendant in a criminal prosecution to cross-examine witnesses testifying against him is guaranteed by the sixth amendment to the Constitution. Courts have not been grudging in their protection of this right. As the Supreme Court recently stated in *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965):

Internal Revenue for evasion of taxes?

Mr. Lamendella: I will object to that, Your Honor.

The Court: I sustain the objection.

Mr. Bellows: May I make another offer of proof?

The Court: Yes.

• • •

Mr. Bellows: My offer of proof, your Honor, is that Mr. Roby, the witness on the stand, is presently under investigation by the Internal Revenue; that he has two lawyers prominent in the tax field in criminal cases representing him, and that if he were cross examined, your Honor, he would admit, I am sure, that he knows that his financial affairs are under investigation by the Internal Revenue for failure to account for taxes and for the evasion of taxes, and that his books are in the hands of the Internal Revenue agents, and that he expects to get consideration, your Honor, from the government for his cooperation with them in this case and for his testimony in this case.

The Court: What is the position of the government in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: We object, your Honor.

The Court: I sustain the objection.

• • •

> There are few subjects, perhaps, upon which the Court and other courts have been more nearly unanimous than in their expressions of belief that the right of . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Both the treatises and the case law recognize the propriety of the kind of cross-examination in which Amabile's counsel sought to engage. Thus Professor McCormick says:

> The law recognizes the slanting effect upon human testimony of the . . . self interest of the witness in the outcome of the case. Any such partiality, proceeding from any acts, relationships or motives, may be proven to impeach credibility . . . [O]ne such instance is[] in a criminal case when the witness testifies for the state and it is shown that an indictment is pending against him. . . .
>
> C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 40, at 82, 83, 84 (1954).

See *Harris* v. *United States*, 371 F.2d 365 (9th Cir. 1967); *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965); *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960). As the Second Circuit observed in *Masino*:

> Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined . . . . It was highly relevant and material to bring out that the state court charge . . . had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government.[3] This is the kind of

[3] The majority says, "As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration." This observation ignores the possibility that the United States Attorney might have interceded with the local authorities on behalf of Riley, a situation similar to that occurring in *Masino*.

situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. 275 F.2d at 132.

It is apparent from the record that the district judge perceived no "collision" of the kind suggested by the majority. Moreover, any attempt to show the bias of a witness by evidence that he is under indictment or investigation would create the same "collision." Thus the rule enunciated by the majority might preclude cross-examination of this kind in every case, a result contrary to the general rule permitting such inquiry. I believe that Amabile's efforts to question the credibility of Riley by showing his relationship to the Government and the reward he hoped to gain by reason of his testimony was entirely proper and should have been permitted.

Finally, the prejudicial trial errors discussed in my dissent in *Bottaglia*, other than the exclusion of the testimony of character witnesses on behalf of Evans, have equal applicability to the instant case. These errors additionally and cumulatively require a reversal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

In the

United States Court of Appeals

For the Seventh Circuit

Tuesday, January 9, 1968

Before Hon. Elmer J. Schnackenberg, *Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Walter J. Cummings, *Circuit Judge*

No. 16312, 16313

United States of America, *Plaintiff-Appellee*,

v.

Salvatore Battaglia and Dave Evans,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

ORDER

In the

United States Court of Appeals

For the Seventh Circuit

Wednesday, April 17, 1968

Before: Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

No. 16312

United States of America, *Plaintiff-Appellee*,

v.

Salvatore Battaglia, *Defendant-Appellant*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby Denied.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 SEPTEMBER SESSION, 1970

No. 17774

UNITED STATES OF AMERICA — *Plaintiff-Appellee,*

v.

SALVATORE BATTAGLIA, — *Defendant-Appellant.*

No. 17780

UNITED STATES OF AMERICA — *Plaintiff-Appellee,*

v.

JOSEPH AMARILE, — *Defendant-Appellant.*

No. 17793

UNITED STATES OF AMERICA — *Plaintiff-Appellee,*

v.

DAVE EVANS, — *Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 2, 1970

Before SWYGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge*, and CUMMINGS, *Circuit Judge*.

CUMMINGS, *Circuit Judge*. Defendants' convictions of violation of the Hobbs Act (18 U.S.C. § 1951) were previously affirmed by this Court, 394 F.2d 304; 395 F.2d 47. Subsequently, the Supreme Court remanded these cases to

the district court "for further proceedings in conformity with *Alderman v. United States*," 394 U.S. 165, or that the district court could determine, after an appropriate hearing, whether the convictions were tainted by the use of illegally obtained electronic surveillance.

Upon the remand to the district court, the Government turned over to Battaglia's counsel the overhearings involving Battaglia. The Assistant United States Attorney advised the district court that there were no overhearings of defendants Evans or Amabile.

At the hearing before the district court, a special agent of the Federal Bureau of Investigation identified three exhibits as excerpts from logs containing overheard Battaglia conversations that occurred when he visited a Chicago tailoring shop being monitored for other persons' conversations. These were examined by the district court and had previously been examined by us. 394 F.2d 327. The Government withdrew its formal offer to introduce these excerpts into evidence at the hearing after defendant Battaglia objected that proper foundation was lacking. Thereafter, on cross-examination by Battaglia's counsel, the agent explained that his duty was to check the records maintained by the Chicago office of the FBI to determine whether or not an individual had been overheard. He stated that these were the only records in his office of electronic surveillance of Battaglia. The agent also testified that his review of index cards indicating the names of the individuals overheard reinforced his conclusion that there were no other overhearings involving Battaglia. Similarly, he found no records of Airtels involving Battaglia.[1]

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[1]Airtels are brief summaries of the information contained in logs of recorded conversations and are sent to FBI offices not having possession of the actual logs. See *United States* v. *Hoffa*, ... F.2d ..... (7th Cir. 1970).

At the conclusion of the hearing, the district court found that Battaglia had failed to demonstrate that the overheard conversations "were relevant to, material to, or tainted in any way, the evidence presented at his trial," and that his conviction was not tainted by unlawful electronic surveillance. Therefore, a new judgment was entered against him, with the 15 year sentence and $10,000 fine reimposed. Likewise, the district court reimposed the same penalties upon defendants Amabile and Evans as had previously been set aside by the Supreme Court pending the outcome of the taint hearings.

I

Defendant Battaglia first attacks the correctness and adequacy of the proceedings of the taint hearing.[2] He also contends that the Government was obliged to turn over the index cards.

After the Government turned over to Battaglia's counsel the records of the overheard conversations, *Alderman v. United States*, 394 U.S. 165, 183, then required Battaglia to "go forward with specific evidence demonstrating taint." Only after Battaglia had shown a ground for finding taint would the Government face the ultimate burden of showing the evidence was untainted. 394 U.S. at p. 183. These strictures were followed by the court below. Instead of attempting to show possible sources of taint, however, defendant's counsel successfully objected to the transcripts of the conversations being received in evidence. Indeed, he has made no attempt to show that they tainted his conviction, apparently agreeing with our prior determination that they were "utterly irrelevant to these convictions." 394 F.2d at p. 328.

[2] Defendant Evans adopted generally the points raised in the briefs of his codefendants, apparently including Battaglia's objections to the taint hearing. However, no contention has been made by either defendant Evans or Amabile as to defects in the hearing procedure.

In *Alderman*, the Court observed that a defendant does not "have an unlimited license to rummage in the files of the Department of Justice." 394 U.S. at p. 185. There has been no showing that the index cards were essential to show taint. Accordingly, we hold that the district court did not abuse its discretion in denying their production and that the hearing satisfied *Alderman*.

II

All three defendants also seek the opportunity to present numerous additional errors relating to their convictions. Although we will not reconsider issues already decided against defendants in their previous appeals (*United States* v. *Hoffa*, F.2d (7th Cir. 1970), we will dispose of five assertedly new points now raised.

First, the defendants claim that the district court was required to permit them to learn the current residence of government witness Riley under *Smith* v. *Illinois*, 390 U.S. 129.[3] However, the record shows that Riley was fearful of physical harm to himself and to his family, so that the trial court properly refused to allow disclosure of Riley's last address. *United States* v. *Varelli*, 407 F.2d 735, 750 (7th Cir. 1969); see also *United States* v. *Palermo*, 410 F.2d 468, 472 (7th Cir. 1969). In addition, defendants had already been permitted to establish that Riley had reason to cooperate with the Government, so that it became unnecessary to show that he was in protective custody.[4] Cf. *United States* v. *Daddano*, ... F.2d ....., ... (7th Cir., 1970).

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[3] This point was also raised without avail in the petitions for rehearing *en banc* to review our prior opinion reported in 394 F.2d 304.

[4] Defense counsel knew that Riley was in protective custody (App. 41) and told the jury he would show this (Tr. 19 in *United States* v. *Amabile, et al.*, No. 67 CR 85 (ND Ill. 1967)). Amabile's

Battaglia further asserts that prejudicial publicity requires reversal of the convictions in light of the ruling in the related case of *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969). In that case, however, the trial judge made no inquiry of the jury as to whether any of them had read prejudicial newspaper items. Here a collective inquiry was twice made of the jury in accordance with *Margoles v. United States*, 407 F.2d 727, 734-735 (7th Cir. 1969), certiorari denied, 396 U.S. 833, and *United States v. Rizzo*, 409 F.2d 469, 402 (7th Cir. 1969), certiorari denied, 396 U.S. 911. Since none admitted contact with prejudicial publicity, it was unnecessary for the district judge to poll each juror separately. *United States v. Solomon*, 422 F.2d 1110, 1116-1117 (7th Cir. 1970), certiorari denied *sub nom. Somone v. United States*, 399 U.S. 911, *United States v. Paddiamo*, F.2d (7th Cir. 1970).

Battaglia argues that the indictment is duplicitous because it charges both a conspiracy and a substantive offense. In this case, the indictment was not duplicitous, for "the allegation of acts which would amount to commission of the substantive offense was merely descriptive of the conspiracy." *Rizzo v. United States*, 317 F.2d 499, 502 (5th Cir. 1963), certiorari denied, 375 U.S. 828.

Battaglia also asserts that the indictment was unconstitutional because it charged a 1964 conspiracy and was "amended and distorted" by permitting proof of a conspiracy beginning in 1962. As pointed out in our prior opinion, that evidence was "relevant to show the reason

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counsel had shown that Di Vito was in protective custody (Tr. 227-238). Battaglia's counsel may have decided not to pursue this same line of questioning with Riley (not blocked by the trial judge's refusal to permit disclosure of Riley's actual address) because it would further emphasize Riley's proclaimed fear for his life.

abdomen of Raley's fear when confronted with Annabile's demand to authorize the second draw" and the jury was instructed to consider it only for that purpose. 394 F.2d at p. 313.

Finally, Battaglia and Annabile complain that they were convicted for violating the general conspiracy statute (18 U.S.C. § 371), carrying a five year maximum prison term, instead of a conspiracy in violation of the Hobbs Act (18 U.S.C. § 1951), which authorizes the imposition of their fifteen year sentences. They urge that the indictment charges a general conspiracy under 18 U.S.C. § 371 to commit the conspiracy defined under 18 U.S.C. § 1951. An examination of the indictment refutes their claim. Defendants were charged only with conspiring to extort money in violation of the Hobbs Act, which is expressly proscribed thereby.[6] Thus the grand jury charged that defendants and Ruben Pranno "did unlawfully * * * conspire * * * to obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951, and the construction of said multiple dwelling units in Lansing, Illinois, and the movement in interstate commerce of

[6] In pertinent part, the Hobbs Act (18 U.S.C. § 1951) provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished] * * * *

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (Emphasis supplied.)

materials, supplies, and other commodities required for the construction, sale, rental and management of said multiple dwelling units, and to attempt so to do by extortion, as that term is defined in Title 18, United States Code, Section 1951." The indictment then details parts of the conspiracy and concludes "[a]ll in violation of Title 18, United States Code, Section 1951."

The judgments of conviction are affirmed.

SWYGERT, *Chief Judge*, concurring in part.

I agree that the issues presented in this appeal relating to the alleged use of illegally obtained electronic surveillance do not require reversal. However, I adhere to my dissents in the prior appeals and would reverse the convictions of the defendants for the reasons stated therein.

A true Copy:

Teste:

Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX

APPENDIX

GRAND JURY TESTIMONY

WILLIAM J RILEY, called as a witness by the Grand Jury, having been first duly sworn by the Foreman, was examined and testified as follows:

Examination by Mr Hadley

Q Would you state your name, please sir?

A William J Riley

Q Would you tell us your address Mr Riley?

A [redacted] Stonegate Road, La Grange Park, Illinois.

Q Now, Mr Riley, before we go any further at this point I want to advise you that you have certain rights as a witness appearing here under subpoena before the Grand Jury.

Now, one of these rights is the right to refuse to answer any question which may be asked of you which might in any way tend to incriminate you and that's your right under the Fifth Amendment to the Constitution of the United States.

Are you aware of that, sir?

A. Yes, sir.

Q. And you also have the right, of course, if you do so, to consult with Counsel of your choosing prior to your appearance here and I presume you have so consulted with your Counsel, have you not, sir.

A. Yes, sir.

Q. And who is your attorney, sir?

A. Mr. Crowley.

Q. Now, Mr. Riley, would you tell the ladies and gentlemen of the Grand Jury your occupation, please?

A. I am a real estate broker.

Q. And under what business name do you do business?

A. The Riley Management Corporation.

Q. And is that a corporation incorporated under the laws of the State of Illinois?

A. Yes.

Q. Now, were you so employed in that business in 1962, sir?

A. Yes, I was.

Q. All right. Is it part of the business of the Riley Management Corporation to develop and manage an apartment development in North Lake, Illinois, known as the King Arthur Apartments?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or dishonor me.

Mr. Betar: Or what?

A. Or degrade me.

Mr. Betar: You think you would de degraded by giving us an answer to that question, Mr. Riley?

A. Is that a question?

I respectfully decline to answer on the grounds that answer might tend to incriminate me or degrade me.

Mr. Bailey: Q. When did you begin construction of the King Arthrur Apartments in North Lake, sir?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Betar: You know Rocco Pranno?

A. I respectfully decline to answer that question on the grounds the answer may tend to intimidate me or incriminate me or degrade me.

Mr. Betar: It might degrade you but I don't think it do you know Jimmy Martell?

A. I respectfully decline to answer.

Mr. Betar: On what grounds?

A. On the ground that my answer may tend to incriminate or degrade me.

Mr. Bailey: Q. Do you know Joseph Amalbine?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Do you know him by any other name? Do you know the name Joe Shime?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Have you ever been in the El Morocco Lounge?

A. I respectfully decline to answer on the grounds my answer may tend to intimidate or degrade me.

Mr. Betar: Did you

Mr. Bailey: You said "intimidate" I think you mean "incriminate"?

A. Yes.

Mr. Betar: Did you talk with Mr. Bailey and myself and Mr. Walsh and Mr. Komensky at your home last week, one evening?

A. I wonder if I might talk to my counsel?

Mr. Bailey: If you would like an opportunity to consult with Counsel about that question, you may.

(Witness left the room.)

The Witness: A. Yes, I did.

Mr. Betar: I take it you consulted with your counsel prior to answering that question, is that correct, Mr. Riley?

A. That is correct.

Mr. Bailey: Q. What are your duties? Would you mind telling the Grand Jury what the job of a real estate broker is?

You told us you were a real estate broker. What duties does that entail? What does a real estate broker do?

A. You are talking about a real estate broker in general?

Q. You, you as a real estate broker, what do you do as a real estate broker?

A. You are asking me to commit myself respectfully—not the real estate brokers in general?

I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Examination by Mr. Belar

Q. What do real estate brokers generally do?

A. Generally, real estate brokers sell real estate, rent real estate, lease real estate for other people.

Q. Are you an officer of the Riley Management Corporation?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is your wife an officer of the Riley Management Corporation?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Your wife? You are answering that question about your wife, that it would tend to incriminate you or degrade you?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you ever pay any money to Joe Shine?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Ever pay any money to Joe Amalbine?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you ever pay any money to Rocco Pranno?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate me or degrade me.

Q. Did the Riley Management Corporation ever pay any money to those three persons?

A. I respectfully decline to answer on the grounds my answer might tend to incriminate or degrade me.

Mr. Bailey: Are you acquainted with Leo Shibaiba (phonetic)?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Betar: Q. He at one time was an alderman in the City of North Lake, was he not?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. You know Pete Anderson?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Bailey: Pete Anderson is the Building Commissioner of the City of North Lake, isn't he?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Betar: Q. Do you have a lawyer in the Riley Management Corporation, legal counsel, I mean other than your counsel who represents you here today, an internal lawyer?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Bailey: Did you ever pay any money to Leo Shibniba or Pete Anderson?

Mr. Betar: Q. How do you think you will be degraded, Mr. Riley? I am just interested. I can see how you can be incriminated but I don't see how you—

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. I am disappointed in you, Mr. Riley, I thought you were more of a man than you have demonstrated here before the Grand Jury after I talked with you, but we all make mistakes.

Examination by Mr. Bailey.

Q. Did you file personal income tax returns on Form 1040 for the year of 1962, Mr. Riley?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. You file them for the year 1963?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Mr. Riley, can you tell the ladies and gentlemen of the Grand Jury, sir, what was happening in respect to the Riley Management Company on June 22nd, 1962?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Is that date particularly memorable to you?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is that the date, Mr. Riley, that you drew checks on the account of the Riley Management Company in the total amount of eleven thousand, one hundred and ten dollars?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. And that total being the total of eight separate checks?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Isn't it true that of those eight checks seven of them, seven checks were charged on your books and records to legal expenses in connection with the North Lake King Arthur Development?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. You didn't pay eleven thousand dollars in legal expenses on June 22nd, 1962, did you, Mr. Riley?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is Joe Shine a lawyer?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Did you ever pay any lawyer at El Morocco Lounge?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is Leo Shibaiba a lawyer?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you put this money in your own pocket?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you pay tax on any of that eleven thousand dollars?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Examination by Mr. Betar.

Q. What kind of occupancy do you have in the King Arthur Apartments?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Any hoodlum occupants?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Do you have a dog?

A. Yes, I do.

Q. How is he feeling?

A. Not too good.

Q. Take him to the vet?

A. Yes, we just got her out yesterday.

Examination by Mr. Bailey.

Q. Mr. Riley, let me show you a photostatic of the check drawn on the account of the Riley Management Corporation, Check No. 18910, dated June 22, 1962 made out to the order of William J. Riley in the amount of five thousand dollars and signed William J. Riley, that is a check drawn on your account to the LaSalle National Bank in Chicago.

What happened to the five thousand dollars, Mr. Riley?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Is that your signature? Is that your signature?

A. I wonder if I could talk to my counsel again.

Mr. Bailey: You certainly may.

We will have a short recess.

(A short recess was taken.)

Mr. Bailey: Miss Reporter, would you read back the last question, please.

(Whereupon the desired portion was read by the reporter.)

The Witness: A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Bailey: Q. And I now show you a non-negotiable voucher representing the same check No. 18919 of the Riley Management Corporation, sir, your corporation, in the sum of five thousand dollars payable to William J. Riley. Is that, sir, a record, a business record of the Riley Management Corporation?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. And does it show on that record that William J. Riley received five thousand on June 22, 1962, sir?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Mr. Riley, on your tax return, the tax year 1962, did you show this five thousand dollars as income?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Betar: Mr. Riley, do you intend to give the same answer that you have been giving, declining to answer on the grounds of the Fifth Amendment to each and every question which we may ask you about the Riley Management Corporation or King Arthur Apartments or any

payments of monies out of the Riley Managgment Corporation?

A. Yes.

Mr. Bailey: Q. Mr. Riley, is it your desire to protect someone who received this money? Is that the reason for your refusal to answer questions?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Are you afraid of Joe Shine?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Are you afraid of Rocco Pranno?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you keep this money?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Bailey: I have no further questions.

Mr. Foreman, you may excuse the witness.

(Witness excused.)

(Which were all the proceedings heard in the above-entitled matter.)

EXHIBIT NO. 3500-0-1

WILLIAM G. RILEY, called as a witness by the Grand Jury, having been first duly sworn, by the Foreman, was examined and testified as follows:

Examination

By Mr. Schippers:

Q. Would you state your full name, please, sir? And spell your last name for the record.

A. William G. Riley, R-i-l-e-y.

Q Mr. Riley, you were in the construction business, is that correct, sir?

A That is correct.

Q Did you give a sworn statement to agent John Walsh and Wallace Oshiro?

A Yes.

Q Did you give that statement on or about the 28th day of November?

A Yes, I did.

Q And did you sign that on or about the 28th day of November?

A Yes.

Q Mr. Riley, I show you the two pages marked Grand Jury Exhibit No. 110, and ask you if that is one of the statements — if that is the statement to which you refer?

A Yes, it is.

Q You notice on that, on the second page it was typed the 28th day of November. That is incorrect, is that right, sir?

A Correct.

Q As a matter of fact, you signed it today?

A I signed it today.

Q Would you read that statement to the ladies and gentlemen of the Grand Jury.

A "I, William G. Riley, age 39, do solemnly swear that the statements made on the following two pages are true and correct and to the best of my recollection. I further state that I have given this statement freely and voluntarily to special agent John W. Walsh, Intelligence Division, Internal Revenue Service. And that no threats or promises have been made to me in connection with the statements made herein.

"In late June, 1962, Dave Evans told me that Joe Shine had been into the rental division office in Northlake that day, and put a $50 deposit on an apartment. When the balance of the rental came due on the apartment in . . .

. . .

"The next time I met with Shine at Palermo's office, I asked him for the rent. Shine said, 'Don't worry about it, I will get it for you.' Shine did not pay his rent.

"The next time I saw him, I asked him again for the rent. Shine said, 'Go blank yourself. Come on, what, are you kidding? Or something.'

"I told Shine that he had forced me to pay off to hire their subcontractors, and now I had to give him an apartment. I said, 'Joe, where is it going to end?' Shine kept saying, 'Don't bother me, you have got lots of money.' I told Shine that the rent from the apartment had to be paid to the owner, and that it was costing me money.

"From June 1, 1962 through June 30, 1965, Shine occupied the apartment in Building 27, but paid no rent other than the $50 deposit which he had made. Every month when the rental was collected, by rental division due, to be paid over to the owner of that particular building, I would have to take the $139 rent which Shine had not paid from my miscellaneous construction fund and place it into the rental division fund to make up the total rentals due the owner of Building 27. This was done every month, starting with July, 1963 through and including June, 1965. Time after time when I asked Shine for the money, he told me that it was costing" excuse me "Time after time I asked Shine for the money and told him that it was costing me that money for the rent which he was not paying me. Shine in reply said 'Oh, come on, you have got lots of money.'

Signed: "William G. Riley, subscribed and sworn on the 28th day of November, 1966."

It is further signed by John M. Walsh, special agent, and Wallace Oshiro, special agent.

Q. You gave that statement freely and voluntarily, did you, sir?

A. Yes, sir.

Q. Mr. Riley, I show you a photograph marked Grand Jury Exhibit 1000, for identification, and ask you if you can identify the person whose photograph appears therein?

A. That is Joe Shime.

Q. That is the man to whom you are referring in this testimony, is that correct, sir?

A. That is correct.

Q. I now show you what has been marked as Grand Jury Exhibit No. 11 for identification, which is a 10-page statement purporting to be a 10-page statement of yourself, and ask you if you made that statement?

A. Yes, I did.

Q. And did you sign that, also, today?

A. Yes, I did.

Q. And you will notice, sir, that again they typed in the 29th. That is in error, is it not, sir?

A. That is correct.

Q. It was actually typed today?

A. Today.

Q. That was given and signed voluntarily and without any compulsion or duress?

A. That is correct.

Q. Read that.

A. "Sworn statement of William G. Riley.

"I, William G. Riley, age 39, do solemnly swear that the statements made in the following 10 pages are true and correct, and to the best of my recollection. I further state that I had given this statement freely and voluntarily to special agent John M. Walsh, Intelligence Division, Internal Revenue Service; and that no threats or promises have been made to me in connection with the statements made herein.

"In 1960, I formed the Riley Management Corporation, Bellwood, Illinois. From 1960 through 1965, I was president, majority stockholder of the Riley Management Corporation.

"In the late winter or early spring of 1962, Frank Falecie, building contractor, came to me with a proposition for a second King Arthur development in Northlake. He told me he had the site in Northlake, Illinois, and could obtain the financing. That he had constructed buildings in Northlake and could obtain the proper zoning in Northlake. His proposition was that he would build the project, and I would sell the buildings and manage the apartments. This proposition greatly interested me. So I commenced to survey the practicability of such a project as to sales and rentals, and told my attorney, Francis Faris, to investigate with Falecie the feasibility of obtaining the necessary Northlake zoning and annexation ordinances.

"Approximately one week after commencing to investigate the possibility of a second King Arthur development, I received a telephone call from Geno Polarmo, a partner of Melrose Park Plumbing Company. Geno said, 'Come on over tomorrow morning at ten. Nick wants to see you.' I told Geno I would be there.

"The next morning I drove to the office of Melrose Park Plumbing Company and entered the office where I met Geno Polarmo. Geno took me into Nick's office where he introduced me to Nick Polarmo. Geno then left the office, and Nick said, 'Bill, I want you to meet Joe Shine. Joe, this is Bill." I shook hands with Shine, and for the first minute or two of the meeting, we merely passed pleasantries. Polarmo then asked me if I was planning a project in Northlake. I told him I was thinking about it, but it was still in the planning stage. Polarmo got up and said, 'Planning blank. What the blank do you think you are doing in Northlake? Don't you ever learn? Shine then said, 'Don't you know that Northlake is our town? We have got Northlake. Nobody can approve anything in Northlake except me. I'm the man to see.'

"Polarmo said, 'Why didn't you tell me? You don't do anything in Northlake without us.' I said, 'Nick, listen.

It is just in the planning stages. I haven't done any of the work. It is just in the planning stages.'

"Polarmo said, 'You don't move a shovel out there without us. Without us, you can't do anything.' Shine again said, 'I am the man out there you want to see. I am the guy that runs that town.'

"I told Polarmo and Shine that the project was something only in the preliminary stages, that I had a lot of work to do on the thing. I also told Polarmo and Shine that my attorney had met with Mayor Nearey, and that Falecie was going to handle the deal. Shine got up screaming and said, 'I am the man. The Mayor can't do anything without me. You saw the wrong guy. That is our town. You do business with us. It will cost you $70 grand to build in Northlake. Without us, you have got nothing.'

"Polarmo said, 'You can build the building in the middle of the street if you want to, and no one will bother you. But without us, you don't turn a shovel.' I told Shine and Polarmo that I had—that I would build a good building, but Shine said, 'I don't care what kind of building you are going to build. You don't turn a shovel without us in Northlake. That is our town.'

"I said, 'Listen, I am not even sure I am going to go with this thing yet. I have got a lot of work to do on this thing yet.' Polarmo and Shine waived these statements aside. Polarmo said, 'What are you, some kind of a smart blank punk, or something? Of course you are going to build it,' I said, 'Listen, I have got to talk to my attorney about this.' Shine said, 'You don't have to talk to blank. We want 70 grand or you don't turn a shovel out there.' I told them that I didn't know yet if I would build the project. But they had the project already started. I told Polarmo and Shine that the deal was not made yet, and that I could not come up with that much money. Shine

said; "I have got to have 30,000 in cash right away to take care of my Northlake people. The nuts over there have to have their money right away.'

"'Polarmo said, 'Don't forget, you are not going to move in Northlake. If you do, we will pull your subcontractors in Addison.'

"Shine said, 'No permits. You don't get nothing in Northlake until we get the 30 grand cash.' Polarmo turned and said to Shine, 'I made this guy. Now, look what he is trying to do.' Shine said, 'You don't do business with nobody in Northlake but me. I am the man.'

"I then received numerous phone calls from Shine concerning the Northlake Project. Approximately one week after the first meeting with Polarmo and Shine, I again met them at Nick's office. Shine said, 'How is the project coming? Have you got the money?' I said, 'Listen, Joe, I haven't even started this thing yet. I don't have a land loan yet.'

"Shine said, 'What the blank, are you a wise guy or something? We can get the zoning for you.' I said, 'I don't need the zoning yet. I am still in the planning stages.' Shine said, 'Listen, I need $30,000 cash, now, to take care of my Northlake people. I said, 'Listen, you guys, I don't even know if I am going to build this yet and you want money. There isn't any money yet.'

"Polarmo said, 'Listen. The Addison project is going pretty good. You don't want trouble out there, do you?' I said, 'No, I don't want trouble, but I am not ready to go yet.' Shine said, 'Get the money together, and we will get the zoning for you. It is our town.'

"Polarmo said to Shine, 'Look at this guy. I made him at Addison, and now he is trying to con us.' Shine said, 'Nearey is our guy. I will take care of Neary.'

"Numerous additional meetings were held over a period of weeks with Polarmo and Shine. Polarmo kept telling

me how he made me in Addison and how he could stop me cold in Addison and Northlake. Polarmo and Shine kept telling me that we had a deal, and I kept telling them that we didn't. During these meetings, I kept trying to tell Polarmo and Shine that Northlake was not definite, and in the event it was, I would not be the builder, only the selling and renting agent. No matter what I said along these lines, they took the position that the Northlake project was a reality. Shine kept saying, 'It will cost you $70,000 to build in Northlake. When we get the $70,000, you have the okay. And with my okay, you can get the zoning and build any way you want.'

"I told him that I wasn't interested in building junk. But he just waved this aside and said, 'I don't care what kind of a building you build, you don't turn a shovel in Northlake without us. That is our town. I have to have the 30,000 cash, now, for the nuts over in Northlake. The other 40,000 you can pay me in checks to legitimate companies.'

"I said, 'Joe, I don't have the money let. I haven't opened up the loans yet, and I might not even go ahead with the project.' Shine said, 'These guys got to have their money. They need their money. They are going on vacation.' Polarmo said, 'You have got big people behind you, now, Bill. You have got it made, now. You have got big people behind you.'

"At these meetings I kept telling Shine and Polarmo that my loans were not opened yet; I had engineering work to do, I had numerous things to do, and if they kept—if I kept coming over here to the meetings, I would never get the project off the ground. Shine then said, 'What the hell am I going to tell the man?'"

"On another occasion during this four- to six-week period, prior to May 25, 1962, I received a call from Nick Polarmo. Nick said, 'Bill, come on over, I want to see

you.' I said, 'Nick, I haven't got the money, I have got things to do; I got a business to run. I haven't got the money.' Nick said, 'Come on over, we have got to see you.'

"When I arrived at Polarmo's office, Shine was sitting there, and I barely got inside the door when Shine said, 'Where the blank is the money?' I said to them, 'I just told you over the phone I don't have the money.' And they would just sit around and talk to me about the money. I kept telling them that I had a business to run, and that they had me going nuts worrying about these things. The conversation would always get back to the point where Shine would say, 'Where the blank is the money?'

"I then said to Polarmo and Shine, 'Let me see if I can explain this to you: First, I have got to get a land loan. Then, I have got to do this. Then I have got to do that. After I got through the whole process, Shine then looked at Polarmo and said, 'Where the blank is the money? What is this guy doing to us?'

"During this time, I received a telephone call every two days from either Shine or Polarmo who said they had to see me right away. When I would get to Nick's office, the first thing Shine would say is, 'Have you got the money? Where is the money? We made a deal. Where is the money?'

"I kept telling them there was no deal. That the engineering had not yet been completed, and that I had no loans yet. By this time, I was scared because I knew they had taken the position that I owed them $70,000 whether I went ahead with the Northlake project or not. I was also afraid that Nick would stop the Anderson project, which would have put my company out of business.

"In May, 1962, I received a tentative approval for a land loan from the First Federal Savings & Loan Association of Berwyn which was subject to proper zoning and

subdividing. A day or two later, I was again called to Nick's office by Shine and Polarmo. I told them about the tentative loan approval, and attempted to explain the details to perfecting a land loan. At this time, they became more demanding, and Shine said, 'Have you got the money? Where the blank is the money?' I told them that I could not get them the $30,000 until after the land loan opened. And to open the loan, I would have to have the proper zoning and subdividing.

"Shine said, 'You are not going to get blank until we get the 30,000 cash. You are not going to do nothing until we get the money. You will get your zoning when we get the $30,000. You will have your zoning like that—snapping his fingers—when the Northlake nuts get their money. When the Northlake nuts get their money, you get your zoning, not before, do you understand? No money, no zoning.'

"I was now backed in a corner because I didn't have the 30,000. On May 25, 1962 I authorized the issuance of a $5,000 check payable to myself, charged against legal fees. I endorsed this check, and then directed my office manager, John O. Hutchinson, to take this check to the La Salle National Bank and cash it and bring the cash back to me. Hutchison did cash the check, and on the same day returned the cash to me at my office at the Riley Management Corporation. When Hutchison had returned from the bank with the $5,000 in 10- and 20-dollar bills, I called Nick Polarmo at his office and said, 'Nick, I have got some money.' Nick said, 'Come over, we will be waiting.'

"When I arrived at the office of Melrose Park Plumbing and went into Nick's office, Shine was there waiting for me. I handed the envelope containing the $5,000 in cash to Shine. He opened the envelope, took out the money and said to Nick, 'What is this guy trying to pull? Here we are trying to make him a living, and what is he trying

to do? Look at this. $30,000 we told him to have, and look at this. I want the rest of the money. Where is the money?

"I said, 'Joe, listen, I haven't got the money. I will get it as soon as I can. I haven't got the money.'

"From May 25, 1962 to June 22, 1962, I received telephone calls daily from Shine and Polarmo asking me to come over to the office of the Melrose Park Plumbing Company because they wanted to see me. I kept stalling them and telling them that I didn't have the money, and Shine then began to make regular visits to my office, always asking me where the money was and demanding it.

"A week or so after the Northlake Council—the Northlake City Council had passed the annexation ordinances and the rezoning ordinance pertaining to the property which I had in Northlake, subject to official signature. I authorized the issuance of Check No. 18910, dated June 22, 1962, payable in the amount of $5,000. I cashed this check at the LaSalle National Bank and returned to my office with it. I then authorized the issuance of Checks Nos. 18923-24-25-26-27, all payable to cash in the amount of $1,000 each.

"The next time Shine called, which was on the same day, June 22, 1962, I told him that I had some money for him. Shine came over to my office, took a look at the money I had for him in the five $1,000 checks, and said, 'Where is the rest of it? The nuts in Northlake need their money. Where is the rest?'

"I said, 'Joe, this is all I can get. You have got $5,000 in cash and you have got five $1,000 checks. Hold on to the checks for two or three days because there isn't enough money in the account to cover them. Don't cash the checks right away.'

"I then authorized the issuance of Check No. 19864 payable to myself dated August 1, 1962, in the amount of

$7,500.00. I cashed the check at the LaSalle National Bank, returned to my office, and told Shine the next time he called to come over because I had some money for him. On the same day, August 1, 1962, Shine came to my office where I gave him the $7,500.00 in cash. Shine and Polarmo continued to hound me for the balance of the funds.

"So on August 9, 1962, I authorized the issuance of Check No. 20091 payable to myself dated August 9, 1962, in the amount of $7,500.00. I cashed this check at the LaSalle National Bank, returned to my office, and on the same day, August 9, 1962, handed this $7,500.00 in cash to Shine in my office.

"I now had paid Shine the $30,000 he requested. Polarmo and Shine agreed that the balance of the funds which I had to pay them amounted to $40,000 which would be paid directly to them in the form of checks. I then obtained a land loan on the Northlake property and began to go forward with the job. Shine and Polarmo continued to call me daily asking for meetings and said they wanted to see me, but I managed to stall them to the point where I could meet them on every third day.

"For approximately one month, I was not contacted by either Shine or Polarmo concerning the $40,000 which they said I still owed them. In the latter part of September, 1962, I received a call from Shine. He said, "How are you doing, Bill, about the rest of the money? Can I come over and see you Monday morning?'

"I then attempted to stall him and said, 'No, I don't have the money, you will have to put it off until the end of the week.' Shine then said, 'What is the trouble, Bill?' I told Shine that I was having trouble opening the building loans, and that there was a lot of work involved before a building loan could be opened. I told Shine that I could not come up with the $40,000 at one time, but that I probably could stand $500.00 a week. Shine said, 'That is okay, Bill, that sounds okay to me.'

"A few days later, Shine called again and said, 'Bill, can I come to you to see you this morning?' I again stalled Shine and said, 'Not yet, Joe, I haven't got the money yet.' Shine said, 'All right, I will be in Monday.'

"These telephone conversations and visits continued to October 1, 1962 when the construction loans were actually opened. On October 1, 1962, Shine came into the office. I told him that I had some money for him. Shine said, 'Where is the money?' I said, 'Joe, have you got the invoice? Have you got something I can write a check to?' Shine said, 'No, I ain't got nothing. I will get it for you next week.'

"I then instructed my office manager, John Hutchison, to prepare a check and said, 'Joe, what do you want the check made out to? Shine said, 'J & S Engineering Company.'

"When Hutchison had prepared the check, I signed it and gave it to Shine. On the following week on or about October 8, 1962, Shine again came into the office and said, 'Where is my check, Bill?' I asked Shine who he wanted the check made out to. He said, 'J & S.' I said, 'Joe, do you have the invoices?' Shine said, 'No, I will get them for you.'

"I authorized the issuance of a check payable to J & S Engineering. I signed the check and gave it to Shine. The two aforementioned J & S Engineering checks Nos. 21184 and 21326 were both payable to J & S Engineering Company in the amount of $500.00.

"On October 15, 1962, when Shine again came into the office, he said, 'Bill, don't use that J & S name any more. Here, use the name of L & J Landscaping Service. Here is an invoice.' The invoice which Shine gave me bore the name of L & J Landscaping Service. I authorized issuance of the following checks in lot numbers in the amount of $500.00:

"21461, 21564, 21722, 21869, 21993, 22125, 22255, 22380, 22521, 22617, 22667, 22854, 22865, 23012, 23126, 23226, 23332, 23498, 23628, 23774, 23904, 24040, 24127, 24257, 24347, 24677, 24783, 24920, 25091, 25233, 25330, 25446, 25579, 25726, 26757, 25918.

"Normally, when Shine came into the office weekly to pick up his $500.00 check, I would be there to give it to him. However, on several occasions when I was absent from the office, I would leave the check in an envelope with my personal secretary, Marzetta McGillicutte, with instructions to give the check to Shine. Marzetta McGillicutte would then give the checks to Shine when he came into my office.

"During the summer of 1963, it became apparent to me that the L & J Landscaping Service was a phony company, and I began to worry about the checks that were issued to the company. I told Shine that we would that we were putting too much money on the one account, and to come up with the name of a legitimate company that I could issue checks to.

"On August 21, 1963, when Shine came into the office to pick up his check, he said, 'Don't use that L & J name anymore. Here, here is an invoice. Use the name Dennis Company. Use the name you know, Dennis Company.'

"From August 21, 1963 through December 30, 1963, I authorized the issuance of the following $500.00 checks payable to the Dennis Company for which I had received an invoice from Shine. The check numbers are: 27007, 27152, 27224, 27383, 27507, 27654, 27816, 27959, 28071, 28176, 28307, 28427, 28583, 28743, 28916, 29016, 29229, 29335, 29427, 29560.

"With only one exception that I specifically recall, all of the J & S, L & J, and Dennis Company checks were picked up by Shine at my office. On one occasion I recall taking the check to Shine at the El Morocco Lounge.

"On January 14, 1964, at the insistence of Shine, I authorized the issuance of Check No. 29892 payable to the L & J Landscaping Service in the amount of $1,000 which I gave to Shine. This was the final payout which I made to Shine on the Northlake King Arthur payoff. In addition, the moneys which in addition to the money, which I was forced to pay Shine to construct the King Arthur project in Northlake, Polarmo forced me to hire certain contractors on this job. They were as follows:

"Scalvitti Sewer & Water Main; Sam Cerniglia; Gail Tyle; Birchwood Plastering; Melrose Park Plastering; Melrose Park Painting Company; the Division Heating Company.

"Late in 1964, after I had been visited at my home by Special Agent John M. Walsh, Intelligence Division, Internal Revenue Service, and where Walsh showed me certain checks which had been endorsed by Joe Amobil, Wayne Sidler, and Leo Schababy the latter two Northlake Aldermen.

"I went to see Shine and Polarmo at Polarmo's office. I attempted to get Shine to realize that I was in serious trouble with the Internal Revenue Service. All Shine said was blank them, burn the records. Polarmo said 'You mean to tell me you showed them the checks?' I said, 'What do you mean, show them? Do you guys come from Mars or something? How do you think you show something like this? All these checks go on the books. Here, I figure you guys had some brains, and then you come in and show me a check that has been signed by Schababy. What are you people, crazy or something?'

"Polarmo said, 'Don't let those guys blank blank—they can't do anything. They have been trying to get us for years.' Shine said, 'Don't tell them anything. You know what happens to guys who talk, don't you?' I said to Polarmo and Shine, 'What is the matter with you guys? On one hand you tell me you will kill me if I don't pay you

the money; on the other hand, these guys tell me they will put me in jail. But if I don't tell them that I paid you the money, that is what I am worried about.'

"Shine said, 'What are you going ' excuse me Shine said, 'You are not going to tell them anything, are you? You haven't told them anything have you?'

"I said, 'Joe, don't be nuts, I am not going to tell them anything.' Shine said, 'Don't you tell them anything.'

"In late 1964 or early 1965, I hired Leo Schalmby, Northlake Alderman, as a lister in my Rental Division. In the course of a training conversation, I told Leo about the mess the company was in and how concerned I was over the Internal Revenue Service investigation. I told Leo that there was a $1,000 check issued on June 22, 1962 which I had given to Shine which bore his endorsement, which I thought was real dumb. Leo admitted that he had received the check from Shine, and that each of the 10 Aldermen received $1,000. He said that if the Internal Revenue Service asked him about the check, he was going to tell them that he got it for doing painting work. I explained to Leo that my books and records did not show this check as having been paid for painting work, but he didn't seem to care.

"(Signed) William G. Riley, signed and sworn this 28th day of November."

By Mr. Schippers:

Q. I will show you what has been previously marked as Grand Jury's Exhibit No. 112 for identification, which consists of a four-page statement, and ask if you gave that statement?

A. Yes, I did.

Q. Did you sign that?

A. Yes, I did.

Q. On or about the date it bears, the 28th day of November?

A. Yes.

Q. Will you read that statement, please?

A. "Sworn statement of William G. Riley.

"I, William G. Riley, age 39, do solemnly swear that the statements made in the following pages are true and correct to the best of my recollection.

"I further state that I have given this statement freely and voluntarily to Special Agent John M. Walsh, Intelligence Division, Internal Revenue Service.

"That no threats or promises have been made to me in connection with the statements made herein.

"In 1960, I began the business known as the Riley Management Corporation. From 1960 through 1965 I was president of the Riley Management Corporation and majority stockholder.

"In 1960, I conceived the idea of constructing multiple dwelling units along a pattern never used before in the Chicagoland area. I designated the name of this apartment project as the King Arthur Apartments, and began looking for unimproved real estate on which to build this project. I found an area suitable to my needs in Addison, Illinois.

"Over a period of months I met several times with Addison, Illinois officials concerning the project and ordinances needed from Addison before I could begin this project.

"After having spent considerable time and investing a large amount of money in this project, the Addison Zoning Board recommended to the Village Board that the project be approved. I estimated at this time that I had approximately $100,000 invested in this project, although I had not yet broken ground.

"Well, my King Arthur project was taken before the Addison Village Board for approval. The project was tabled until such time as the Sewer and Water Committee could study the project. Once the Sewer and Water Com-

mittee began looking into the project, I began to encounter real problems. In my opinion, their recommendations and asking for sewer mains and water mains were unreasonable, and not relevant to the project at hand. I refused to meet the demands of the Sewer and Water Committee. And as a result, the Committee failed to give my project their approval and recommended the Village Board not to resubdivide the property as I requested.

"I then hired an engineer to re-work the plans so that the buildings could be built on the existing subdivision plot. I then took the new plan before the Village Board to obtain building permits. During the next meeting of the Addison Village Board, Mayor Robert McHugh looked over the new layouts, saw that they were changed, and that the project could be built according to the existing subdivision, and became incensed. He asked me what I was trying to do and told me that I would never build in this town. I explained to the Village Board about the expenses which I had already incurred in attempting to get this project off the ground, and told them that unless they issued permits I would be out of business. The Board refused to issue my permits.

"While attempting to obtain the necessary permits from the Village of Addison, I had hired Anthony Novelli as my building superintendent on the Addison project. Novelli had been working on a full-time basis attempting to get all the subcontractors lined up. Two or three days after they, the Village Board of Addison, had turned down my request for building permits, he came to my office in Bellwood, Illinois and told me that he had heard that if I hired the Melrose Park Plumbing Company to do the plumbing work in the Addison project, that I would be able to obtain the Addison building permits.

"I discussed this matter with my business associate, Francis Faris, who is also the attorney for the company,

and with the prospect of losing the $100,000 I invested in the project — I asked Faris and Novelli to go to the Melrose Park Plumbing Company to see what they could find out. Faris and Novelli did go to the Melrose Park Plumbing Company where they met Nick Polarmo, a partner of the company. Faris discussed the King Arthur project plans with Polarmo and told him of the problems they were encountering in obtaining building permits.

"Faris also told me that he asked Polarmo what his plumbing price was per building, and all Polarmo would tell him was that his prices were in line.

"Faris told me that Polarmo told him that if he wanted to get the project started, he had to get the plumbing project. Faris tentatively agreed to this deal and told Polarmo that he had to discuss it with me, but Polarmo brushed this aside and said, 'This is a deal,' and then made a telephone call to Pat Rawlings who was a member of the Building Committee of the Village of Addison, and told Rawlings to get his —' it was left out — 'over to Polarmo's office.

"A short time later, Rawlings showed up at Polarmo's office, and Polarmo told him to issue Riley building permits because Riley was going to start building tomorrow. Within two or three days or a week, the building permits which I had requested were issued by the Village of Addison. And hearing this, I then ordered that the project immediately begin, and so directed Anthony Novelli. Novelli began the Addison project, and for approximately six weeks, the project ran with no problems. Novelli did obtain three or four building permits, and everything seemed to be running smoothly.

"After the project had been under way for approximately six weeks, August or September, 1962, Novelli came into my office and told me that he had been approached

by an individual known as Jimmie Saviola. Novelli reported to me that Saviola had told him that they were supposed to have been taken care of in Addison. Novelli stated that he thought this meant that the Addison officials had to be taken care of, and asked me what he should do about it. I called Francis Faris into my office, discussed this matter with him, and told him (Faris) to meet with Saviola and find out what was going on. Faris and Novelli then met with Saviola, and Faris reported back to me and told me what had taken place. Faris stated that he had met Saviola at the Terrace Restaurant on Lake Street, south of Addison Road in Addison, and that Saviola said that the Addison people had to be taken care of.

"Faris told me he told Saviola he thought the deal for the Addison buildings only included the company using the Melrose Park Plumbing Company as a subcontractor.

"According to Faris, Saviola then said, 'Why didn't you tell me you were Batter's man?' Saviola then told Faris and Novelli that it was up to them to decide how much it was worth to keep the Addison officials happy. Faris and I then decided that rather than rock the boat, we would pay Saviola $1,000 a building, or a total of $13,000.

"Beginning in the late summer, early fall of 1961, and continuing over the next 18 months, I authorized the issuance of several checks totaling $13,000 payable in cash to myself or Francis Faris, which checks were cashed by Faris. Then the cash was given to Saviola, either at the Terrace Restaurant or the Countryside Liquor Store in the Addison Shopping Center.

"During this 18-month period, the Addison project construction was under way; Saviola called Faris on a number of occasions and would ask him for money. A period

of time would pass — sometimes as long as two or three weeks — when Novelli would come into the office and tell me that Saviola was around again — sometimes as long as two or three weeks. That the Addison officials were around again, and asked me if I owed Saviola some more money. I would then authorize the preparation of a check which I would give to Faris to be cashed and passed on to Saviola. Check No. 13240, drawn on the account of the Riley Management Corporation at the Elmhurst National Bank, dated October 16, 1961, payable to cash in the amount of $3,000 is one of the checks which I authorized to be issued in cash, the proceeds of which Faris told me he paid to Saviola. The reverse side of this check bears the endorsement of Francis Faris, Junior, and I recognize this signature as that of Francis Faris.

"Check No. 18921, dated June 22, 1962, payable in cash in the amount of $1,000 drawn on, for account at the La Salle National Bank is one of the checks which I authorized to be issued and cashed, and the proceeds which Francis Faris gave Saviola. The endorsement on the reverse side of this check reads: 'Francis W. Faris, Junior,' is the endorsement of Francis Faris.

"I authorized Francis Faris to pay Saviola $13,000 on the Addison, King Arthur project because I was afraid that if I did not make these payments to Saviola, I would encounter problems from the Addison officials, and stood to lose more than $300,000 which I had already invested in this project.

"The initial deal which Faris had made with Polarmo in order to get the Addison building permits was for me to hire the Melrose Park Plumbing Company and to do the plumbing work on the Addison project. As the project progressed to the point of awarding other contracts, Nick Polarmo sent other subs that he wanted hired to the con-

struction site to see Novelli. Novelli would then refer the subcontractors to me. I asked them — forget that — I talked to them and told Novelli to hire them or give them the subcontract work if their price was right.

"In my opinion, the prices charged by the subcontractors referred to me by Nick Polarmo were in line. However, after they began working on their project — on the project, they were great for charging extra for work done. The pressure to hire the subcontractors referred to me by Polarmo came through Anthony Novelli on the construction site.

"Within days after construction commenced on the Addison project, I met Geno and Dan DelPirro — I mean Geno Polarmo and Dan DelPirro of the Melrose Park Plumbing Company, and they told me that part of the deal was that they would get the electrical and heating work on the project. I told them that no such deal had been made, and Geno said, 'Yes, it was.'

"As a result of these pressures, I did award the work on the Addison project to the Melrose Park Company on the electric, and a portion of the heating work to Division Heating, another subcontractor referred to me by Polarmo.

(Signed) "William G. Riley."

Mr. Schippers: Thank you, Mr. Riley.

Will you continue his subpoena?

The Foreman: Yes. Your subpoena is continued generally.

(Whereupon, no further proceedings were had before the Grand Jury this day.)

(In Re Grand Jury Investigation)
Grand Jury No.
65 GJ 2395

BEFORE THE FEDERAL GRAND JURY

Tuesday, November 29, 1966 2:00 o'clock p.m.

The Grand Jury reconvened pursuant to adjournment.

Present: Mr. Joseph Lamendella
Mr. David P. Schippers
Mr. Sam Betar
Assistant United States Attorneys.

WILLIAM G. RILEY, called as a witness by the Grand Jury, having been first duly sworn by the Foreman, was examined and testified as follows:

Examination

By Mr. Joseph Lamendella:

Q. Will you state your name, please, sir?

A. William G. Riley.

Q. Are you the same William G. Riley who testified here yesterday?

A. Yes, I am.

Q. Mr. Riley, let me show you what has been marked G.J. 113.

What is that?

A. That is the statement I made to Mr. Walsh.

Q. Was that statement made on the date it shows, sir, on Page 2?

A. It was made today. If today is the 29th, it is on the same day.

Q. Did you sign that statement?

A. Yes, I did.

Q. Did you initial each page?

A. Yes.

Q. Read that.

A. "I, William G. Riley, age 39, do solemnly swear that the statements made in the following pages are true and correct to the best of my recollection. I further state

that I have given this statement freely and voluntarily to Special Agent John M. Walsh, Intelligence Division, Internal Revenue Service, and that no threats or promises have been made to me in connection with the statements made herein.

"I further state that during the years 1960 through 1963, I was the president and majority stockholder of the Riley Management Corporation, Bellwood, Illinois.

"In the summer of 1963, I found some property contiguous to Westmont, Illinois, which was suitable for another King Arthur Apartment Project. Anthony Novelli, an employee, came to me and told me that he thought he could get the necessary zoning, annexation, and permits for the project, and that he would attempt to keep the "hoods" out of it. I was now convinced that the only way I could proceed with my company operations was to break away from Nick Palermo and Joe Shine. So, I told Novelli to go ahead and see what he could do and subsequently I attended several meetings with Westmont officials and explained my proposed building plans. The officials appeared to be enthusiastic about the plans.

"Prior to beginning the Westmont King Arthur project, I received a telephone call from Joe Shine who said, 'I want to see you at the apartment, come on over.'

"I went to Shine's apartment located in the King Arthur Northlake Apartment Project, Building 27, Apartment 304, and knocked on the door. Shine opened the door, motioned for me to come in and when I got inside the room, saw that Nick Palermo was there.

"We said hello to each other and Palermo then jumped up, put his face directly into mine and said, 'What the blank do you think you are doing in Westmont? You are not going to move a shovel in Westmont without us. If

you try to go out to Westmont without us, you will not only be stopped there but we will stop you cold in North lake.'

"The Northlake King Arthur was still under construction at that time.

"Shine jumped up and said, 'Yeah, on top of that we will get the politicians on you and the building inspectors too.'

"Palermo said, 'I'll guarantee you another thing too you won't get any contractors to work in Westmont if you don't take us out there with you.'

"I told Nick that his company was already behind their work on the Northlake project, that they were slowing the Northlake project down and as a result of this slowdown, I was behind schedule in the opening of construction loans. I told Palermo and Shine that since they had nothing to do with the purchase of the land, the obtaining of the necessary zoning or permits and since Palermo's companies were doing such a lousy job and were in fact costing him money and because their work was inferior, I was not going to hire him on the Westmont job.

"Palermo again jumped up and said, 'You ain't making said 'You are a blank liar. Nobody does better work than I do. Nobody does it faster. Nobody does it cheaper,' and turning to Shine, he said, 'He's a blank liar.'

"I told Palermo that I just couldn't continue to build the projects with the three pipe trades that he was forcing upon me for doing such a lousy job.

"Palermo again jumped up and said, 'You ain't making a move without us. None. Nothing without us.'

"Shine then said, 'Where the hell do you think you are? You got the army and the navy behind you with us. You ain't got nothing to worry about.'

"Nick then chipped in again and said, 'You ain't going to turn a blank thing without us.'

"And at the same time Shine was gesturing in my face with a lighted cigarette as though to push it into my face.

"Palermo continued and said, 'Northlake won't go at all. Everything will stop without us. You get a plumber in Westmont and I'll stop you, you rotten little S.O.B. Where the hell do you get off with this?'

"I said, 'Look, I've had enough of this. I'm leaving. There is no sense in this kind of screaming. You guys don't even understand what I am up against. Can't you get it in your heads that I'm shaky. I am about to go under? I am broke. I just don't care any more. You are screaming for money. Don't you understand you are going to break me? If I give you Westmont, you will turn around and say you can't do anything else until I pay you. I've got to go separately on this thing in order to keep my head above water.'

"Palermo kept saying, 'You are not going anywhere. Sit down, you punk.'

"On two or three occasions I got up to leave but Shine physically blocked the door so I could not leave, and when I did attempt to leave Shine said, 'Where the blank do you think you are going? Sit down. You are not going any place. What's this crap? You are not making a move any place without us.' Shine then said, 'Where do you think you got Westmont? You got it from us.'

"I said, 'Come on, Joe, you are nuts; I got it on my own. You had nothing to do with it. You guys are breaking me. Where the hell do you think I get this money? On trees? By the time I chase you guys around and waste my time with you, and you tell me I can build buildings in the middle of the street in Northlake and now all I've had is heat and problems. I am fed up with you. And now

because of you guys working with me I can't get mortgages on account of you. If I wasn't tied up with you guys and everybody knows it, I could get mortgages any place, any time. I would have mortgage companies fighting to lend me money. But nobody wants anything from me or will give me anything because they find out you people are in with me. Do you think it is all profit? Don't you know business?'

"With this, Palermo got up screaming, again put his face into mine and said, 'That's a blank lie. Nobody is cheaper than me. Nobody does better work than me. What are you trying to do?' And all the time he was pounding the table and almost foaming at the mouth. At this point Palermo got so mad that he said, 'What do you, what do you think, what am I.' He was so mad that he could not complete any sentence that he started and just kept going on and on like this.

"I told Nick that his plumbing work was no good; that I had leaks all over the Northlake and Addison project.

"Palermo turned to Shine and said, 'Blank, he is a blank liar. He lies.' And then he would hiss through his mouth as though he was going to explode.

"After two hours of this continual shouting match with Palermo and Shine, I attempted to pacify them and offered to give Palermo a couple of the buildings in the Westmont project but not all of them.

"Palermo said, 'You'll give them all to me.'

"I said, 'But, Nick, you can't handle them. You don't have the people to do them. You are behind in your work now. Can't you talk about this nicely? Don't you know I'm not paying my bills? You guys are killing me. I'm having trouble opening loans and as it stands now, and as it stands now I'm the only guy in the suburb who is selling his buildings. Don't you know I'm the only one creating sales?'"

"Palermo said, 'You blank punk. It is because of us, not because of you. That's why, you stupid blank, blank. You have the army and the navy behind you.' Palermo then said, 'I'm going to bury that S.O.B. Hubley. I'm going to bury that guy.'

"In the meantime, I received a call from Nick Palermo. Palermo said, 'I want to see you at the office.' I went over to Palermo's office and he said, 'If you hire another contractor to do the work in Westmont, you are through. Nobody is going to show up on that job. I'll pull every man on Northlake and nothing will get done. Nobody will show up.'

"Rather than have both projects go down the drain, I gave Palermo the Westmont project."

Signed William G. Riley.

Q. Do you have any additions or deletions to this statement, Mr. Riley?

A. No, sir.

Mr. Lamendella: Mr. Schippers, do you have any questions?

Mr. Schippers: No questions.

Mr. Lamendella: Any member of the Grand Jury have any questions?

(No response)

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1032

SALVATORE BATTAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, together with Dave Evans and Joseph Amabile,[1] was convicted after a jury trial in the United States District Court for the Northern District of Illinois in April, 1967, of conspiring to obstruct interstate commerce by means of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner was sentenced to fifteen years' imprisonment. The court of appeals affirmed with one judge dissenting (Pet. App. 1–45, 394 F. 2d 304). A motion for remand was denied (Pet. App. 46–48, 394 F. 2d 327), as was a petition for re-

[1] Both Evans and Amabile filed separate petitions for writs of certiorari (Nos. 925 and 930, this Term), to which the government's response was filed on December 14, 1970.

413-767—71

hearing (Pet. App. 71). On separate petitions for writs of certiorari (Evans: No. 106, O.T. 1968; Amabile: No. 129, O.T. 1968; Battaglia: No. 108 O.T. 1968), to which the government filed a single response, this Court remanded the cases along with a number of others (*sub nom. Giordano* v. *United States*, 394 U.S. 310) for further district court proceedings in conformity with *Alderman* v. *United States*, 394 U.S. 165; these proceedings related to three electronically overheard conversations involving petitioner and previously disclosed by the government to the court of appeals, which, after *in camera* examination, were held by that court to be irrelevant. After a full evidentiary hearing on the remand, the district court found that the overhearings did not taint the convictions, and reimposed the original judgments and sentences. The court of appeals again affirmed, with one judge concurring on the eavesdropping question but adhering to his original dissent in the prior appeals (Pet. App. 72–78).

Petitioner, like his codefendants Evans and Amabile, does not now raise any eavesdropping issue. Instead, he has resubmitted substantially the same issues which were contained in his previous petition and which were answered in detail in our prior brief in opposition. His reargued claims are, in essence, that the evidence was insufficient to establish that he conspired to commit extortion in violation of the Hobbs Act (Pet. 16–24, answered at pp. 11–14 and 20–21 of our prior brief); that the grand jury testimony of government witnesses should have been fully disclosed to the defense (Pet. 24–29, answered at pp. 14–17 of

our prior brief); and that improper limitations were placed on defense cross-examination of the victim of the conspiracy (Pet. 29–32, answered at pp. 19–20 of our prior brief; see also n. 3 on p. 3 of our joint response to the petitions in Nos. 925 and 930, this Term).[2]

The present petition includes two additional arguments:

1. Petitioner asserts that reversal of his conviction is required because of prejudicial publicity during the trial (Pet. 32–39).[3] He does not contend that any of this publicity in fact reached the jury, but rather complains that the trial judge erred by asking the jury collectively, instead of questioning each juror separately, whether each member had complied with the court's instructions on this matter. In support of his assertion, petitioner relies chiefly on a recommendation of the American Bar Association Project on Minimum Standards of Criminal Justice (Pet. 34–35), and two earlier decisions of the court below: *United States* v. *Palermo*, 410 F. 2d 468 (C.A. 7), and *Margoles* v. *United States*, 407 F. 2d 727 (C.A. 7), certiorari denied, 396 U.S. 833. The court of appeals distinguished *Palermo* because in that case the trial judge did not question the jurors at all regarding their exposure to adverse publicity (Pet. App. 76). And, as the court also noted,

[2] Together with our joint response to petitions in Nos. 925 and 930, we filed, for distribution to the Court, ten additional copies of our brief in opposition filed in the 1968 Term.

[3] As the court below in its prior opinion observed (Pet. App. 23), petitioner and his co-defendants successfully objected to sequestering the jury, which would have eliminated the possibility of any juror exposure to prejudicial publicity.

collective questioning of the jury was indeed approved by *Margolies*, which required individual questioning only of jurors actually exposed to prejudicial publicity (*ibid.*).

2. Petitioner further contends that error occurred in the midtrial instruction that evidence previously admitted against only those defendants present when the acts or conversations took place could at that point be considered against all defendants "as evidence in connection with the alleged conspiracy charged in the indictment" (Pet. 39–42). The court below correctly rejected this contention in its first opinion (Pet. App. 13–15, 394 F. 2d at 312–313), on which we here rely. See also our brief in opposition in *Jacobs* and *Spiegel* v. *United States*, Nos. 917 and 6139, this Term, a copy of which we shall provide to petitioner's counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
SIDNEY M. GLAZER,
MARSHALL TAMOR GOLDING,
Attorneys.

JANUARY 1971

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No. 1082

In the Supreme Court of the United States

October Term, 1970

SALVATORE BATTAGLIA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In this reply, the Petitioner will limit himself to directing the Court's attention to several decisions which, it is believed, are pertinent to the issues made by the Petition and response.

1. It is respectfully submitted that on January 11, 1971, in *Bostic* v. *United States*, No. 5230, October Term 1970, this Court granted review on Petition for Certiorari. Questions there involved are strikingly similar to issues involved in the case at bar.

Question 1 in the *Bostic* case is:

> "(1) Does Bruton v. U.S., 391 U.S. 423, 3 CrL 3085, invalidate the rule that evidence of statements by one conspirator in furtherance of the conspiracy are admissible against all members of the conspiracy, and not only the declarant?"

Question 3 in the *Bostic* case is:

> "(3) Did the totality of the circumstances, including pretrial publicity, joinder of other defendants and offenses, prosecutorial tactics, instructions, and latitude given the government in examining its own witnesses, deprive the defendant of a fair trial?"

Question 3 in the *Bostic* case on which certiorari has been granted, relates to question 7 presented in the Battaglia Petition herein, with related argument thereon appearing in "Reasons for Granting the Writ" under point 4 at Page 32 *et seq.*

However, the entire impact of prejudicial occurrences during the trial as asserted in all of the questions in the Battaglia Petition herein and in the "Reasons for Granting the Writ", should be reviewed by this Court.

2. In *United States* v. *Schartner*, 426 F.2d 470, 478, the Third Circuit Court of Appeals reversed for failure of the trial court to afford Schartner's counsel opportunity to object to the charge outside the jury's hearing, 426 F.2d 478.

Question 4(b) in Battaglia's Petition for Certiorari herein, and argument made under No. 5 of "Reasons for Granting the Writ" at Page 40, present in this case this question. The Court's conduct of the matter appears at A. 742, *et seq.*, and is described at Pages 40 and 41 of the Petition.

CONCLUSION

While the Petitioner seeks grant of certiorari, and in support of this request relies upon all of the points urged, and cumulative errors indicated therein, it is respectfully suggested that Petitioner should at least be granted the review involved in *Bostic* v. *United States*, No. 5250, October 1970 Term, Certiorari granted January 11, 1971.

Respectfully submitted,

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